In the

# United States Court of Appeals

## For the Seventh Circuit

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## No. 9753

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THE UNITED STATES OF AMERICA,
*Plaintiff-Appellant,*

*vs.*

MORTON SALT COMPANY,
*Defendant-Appellee.*

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

J-29790 The Gunthorp-Warren Printing Co., Chicago—12-30-48—65

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1 Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of July (it being the 5th day thereof) in the year of our Lord One Thousand Nine Hundred and Forty-Eight and of the Independence of the United States of America, the 173rd year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Friday, August 20, 1948.

Court met pursuant to adjournment.

Present Honorable Philip L. Sullivan, Trial Judge.

2 IN THE UNITED STATES DISTRICT COURT.

For the Northern District of Illinois,

Eastern Division.

United States of America,
*Plaintiff,*
*vs.*
Morton Salt Company,
*Defendant.*
} No. 48 C 698.

Be It Remembered, that, on to-wit, the 18th day of May, 1948, the above-entitled action was commenced by the filing of the following Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

3 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-698) * *

## COMPLAINT.

Plaintiff, by Otto Kerner, Jr., United States Attorney in and for the Northern District of Illinois, acting under the direction of the Attorney General, upon request of the Federal Trade Commission, brings this action for the enforcement of an order of the Federal Trade Commission which required defendant to file a special report and for the recovery of forfeitures because of the failure of the defendant to comply with the said order.

1. The action arises under Title 15, U. S. C. A., Section 49, being Section 9 of the Act of September 26, 1914 (38 Stat. 717), as amended March 21, 1938 (52 Stat. 111) (the said Act as amended being hereinafter referred to as the "Act"), vesting the several district courts of the United States with specific jurisdiction to enter orders commanding a corporation to comply with any order issued by the Federal Trade Commission pursuant to the
4 said Act, and under Title 15, U. S. C. A., Section 50, being Section 10 of the said Act, vesting any district

court of the United States in which a corporation has its principal office or in which it does business with specific jurisdiction of suits by the United States for the recovery of forfeitures if the corporation shall fail to file any special report required by the said Act within the time fixed by the Federal Trade Commission for filing the same, as hereinafter more fully appears.

2. The defendant, Morton Salt Company, is an inhabitant of the Northern District of the State of Illinois. It is a corporation organized and existing under the laws of that state, and has its principal place of business at 310 South Michigan Avenue, Chicago, Illinois. The defendant transacts a substantial part of its business in the Northern District of the State of Illinois.

3. During all the times herein mentioned defendant was engaged in the business of producing various types and grades of salt, and of selling and distributing such salt in interstate commerce, as "commerce" is defined in Title 15, U. S. C. A., Section 44, being Section 4 of the said Act.

4. The Federal Trade Commission, on September 2, 1947, issued an order pursuant to the provisions of Rule XXVI of its published Rules of Practice (12 Fed. Reg. 5444, 5448), promulgated under and in accordance with the provisions of Title 15, U. S. C. A., Section 46(g), being subsection (g) of Section 6 of the said Act, and pursuant to the provisions of Title 15, U. S. C. A., Section 46(a) and 46(b), being subsections (a) and (b) of Section 6 of the said Act, requiring the defendant to file a report with the Federal Trade Commission within 30 days after the date of service of the order. A true and complete copy of the said Rule XXVI is attached hereto marked "Exhibit A" and made a part hereof. The said order dated September 2, 1947, requiring the defendant to file the report is set forth in full below:

## UNITED STATES OF AMERICA.

### Before Federal Trade Commission.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 2nd day of September, A. D. 1947.

Commissioners:

Garland S. Ferguson, Chairman,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer,
Lowell B. Mason.

In the Matter of
Salt Producers Association, *et al.* } Docket No. 4320.

## ORDER REQUIRING ADDITIONAL REPORTS OF COMPLIANCE FROM CERTAIN RESPONDENTS.

This matter coming on to be considered on the Commission's own motion and upon further consideration of the reports of compliance with the order to cease and desist heretofore received and filed on behalf of the respondents under dates of August 2 and August 3, 1943, and the Commission being of the opinion that the public interest requires that there be filed on behalf of the respondents named below, an additional and supplemental report showing the manner and form of compliance with the modified order to cease and desist entered by the Commission on August 10, 1943, and with the decree of the Circuit Court of Appeals for the 7th Circuit entered on April 22, 1943, and pursuant to Rule XXVI of its
6 published Rules of Practice, and the authority granted in subsections (a) and (b) of Section 6 of the Federal Trade Commission Act (38 Stat. 721; 15 U. S. C. A. Sec. 46).

Now, Therefore, Be It Ordered that respondents Salt Producers Association; Avery Salt Company; Barton Salt Company; Carey Salt Company, Cayuga Rock Salt Company; Colonial Salt Company; Detroit Rock Salt Company; Diamond Crystal Salt Co., Inc.; International Salt Company; Jefferson Island Salt Company, Inc.; Hardy

Salt Company; Morton Salt Company; Myles Salt Company, Ltd.; Mulkey Salt Company; Ohio Salt Company; Ruggles & Rademaker Salt Company; Saginaw Salt Products Company; Union Salt Company; Watkins Salt Company; and American Salt Corporation, within thirty (30) days after service upon them of this order, shall file additional reports showing in detail the manner and form in which they have been, and are now, complying with said modified order to cease and desist and said decree of the United States Circuit Court of Appeals for the 7th Circuit;

It Is Further Ordered that there shall be submitted, as a part of such supplemental reports of compliance, a complete statement on the part of each of the producer respondents named above, of the prices, terms and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements distributed, published or employed in marketing salt from and after January 1, 1944;

It Is Further Ordered that there shall be submitted as a part of such supplemental report of compliance on the part of respondent Salt Producers Association a statement of the present organization and objectives of said respondent association, together with a detailed description of all activities and services supplied to or conducted by said respondent association for or on behalf of its members from January 1, 1944, to date.

By the Commission.

Otis B. Johnson,
*Secretary.*

7 5. The order dated September 2, 1947, was served on the defendant by registered mail on September 4, 1947. A true and complete copy of the return receipt signed by the defendant showing service of the said order is attached hereto marked "Exhibit B" and made a part hereof.

6. The Federal Trade Commission, on September 22, 1947, issued its order extending until November 1, 1947, the time for filing the report required by its order dated September 2, 1947. A true and complete copy of the said order dated September 22, 1947, is attached hereto marked "Exhibit C" and made a part hereof.

7. The order dated September 22, 1947, was served on the defendant by registered mail on September 24, 1947. A true and complete copy of the return receipt signed by the defendant showing service of the said order is attached hereto marked "Exhibit D", and made a part hereof.

8. The Federal Trade Commission, on February 27, 1948, pursuant to Title 15, U. S. C. A., Section 50, being Section 10 of the said Act, issued its notice of default to defendant because of defendant's failure to file the report required by the order dated September 2, 1947. The notice of default is set forth in full below:

UNITED STATES OF AMERICA.

Before Federal Trade Commission.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 27th day of February, A. D. 1948.

Commissioners:

Robert E. Freer, Chairman,
Garland S. Ferguson,
Ewin L. Davis,
William A. Ayres,
Lowell B. Mason.

In the Matter of
Salt Producers Association, *et al.* } Docket No. 4320.

Notice of Default to Morton Salt Company.

Whereas the Federal Trade Commission on September 2, 1947, pursuant to Rule XXVI of its published Rules of Practice and to the authority granted in subsections (a) and (b) of Section 6 of the Federal Trade Commission Act (38 Stat. 721), issued its order requiring Morton Salt Company, a corporation, to file an additional and supplemental report within thirty days after service upon it of the said order showing in detail the manner and form in which it has been, and is now, complying with the modified order to cease and desist issued by the Commission on August 10, 1943, and further requiring Morton Salt Com-

pany to submit as a part of its supplemental report of compliance "a complete statement * * * of the prices, terms and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements distributed, published or employed in marketing salt from and after January 1, 1944"; and

Whereas the said order of the Commission dated September 2, 1947, was duly served upon Morton Salt Company by registered mail on September 4, 1947; and

Whereas the Commission, on September 22, 1947, issued its order extending the time for filing the said supplemental report of compliance until November 1, 1947; and

Whereas Morton Salt Company has failed to file the supplemental report of compliance containing the information required by the Commission's said order dated September 2, 1947, on or before November 1, 1947, or at any time thereafter prior to the date of this resolution, and no additional time having been requested by Morton Salt Company or granted by the Commission for the filing of the said report; and

Whereas Section 10 of the Federal Trade Commission Act (38 Stat. 723) provides in part as follows:

"If any corporation required by this Act to file any annual or special report shall fail so to do within the
9 time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business."

Now, Therefore, You, Morton Salt Company, Are Hereby Notified, as provided for in Section 10 of the Federal Trade Commission Act (38 Stat. 723), that you are in default in having failed to file the report containing the information required by the Commission's order dated September 2, 1947, on or before November 1, 1947, or at any time thereafter.

By the Commission.

Otis B. Johnson,
*Secretary.*

9. The said notice of default dated February 27, 1948, was served on the defendant by registered mail on March 1, 1948. A true and complete copy of the return receipt signed by the defendant showing service of the notice of default is attached hereto marked "Exhibit E" and made a part hereof.

10. The failure of the defendant to file the report required by the order of the Federal Trade Commission dated September 2, 1947, has continued for 30 days after notice of such default and is still continuing.

11. The defendant, because of its failure to file with the Federal Trade Commission on or before April 1, 1948, the report required by its order of September 2, 1947, is liable to pay to the United States a forfeiture in the sum of $100 for each and every day of the continuance of such failure.

10 Wherefore, Plaintiff Demands:

1. That the court issue a mandatory injunction commanding defendant, its agents, attorneys, employees and assigns to file with the Federal Trade Commission the report required by its order dated September 2, 1947.

2. Judgment against defendant in the amount of $100 a day for each and every day from and after April 1, 1948, the defendant has failed to file with the Federal Trade Commission the report required by its order of September 2, 1947.

3. That defendant pay the costs of this action.

4. That plaintiff be given such other and further relief as the court may deem just and proper.

United States of America,
By Otto Kerner, Jr.,
*United States Attorney,*
*Chicago, Illinois.*

J. Stephen Doyle,
*Special Assistant to the Attorney General, United States Department of Justice,*
*Washington, D. C.*

Joseph S. Wright,
*Assistant General Counsel,*
*Federal Trade Commission,*
*Washington, D. C.*

J. B. Truly,
*Special Attorney, Federal Trade Commission, Washington, D. C.*

11 District of Columbia, } ss.
City of Washington. }

Otis B. Johnson, being first duly sworn, deposes and says that he is the Secretary of the Federal Trade Commission; that he makes this affidavit on behalf of the plaintiff in the foregoing complaint; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true.

Otis B. Johnson.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 28th day of April, 1948.

Denis E. Connell,
(Seal) *Notary Public.*

My commission expires March 11, 1951.

12 Exhibit A.

Rule XXVI.

REPORTS SHOWING COMPLIANCE WITH ORDERS AND WITH STIPULATIONS.

In every case where an order to cease and desist is issued by the Commission for the purpose of preventing violations of law and in every instance where the Commission approves and accepts a stipulation in which a party agrees to cease and desist from the unlawful methods, acts, or practices involved, the respondents named in such orders and the parties so stipulating shall file with the Commission, within sixty days of the service of such order and within sixty days of the approval of such stipulation, a report, in writing, setting forth in detail the manner and form in which they have complied with said order or with said stipulation; provided, however, that if within the said sixty (60) day period respondent shall file petition for review in a circuit court of appeals, the time for filing report of compliance will begin to run de novo from the final judicial determination; and provided further that

where the order prevents the use of a false advertisement of a food, drug, device, or cosmetic, which may be injurious to health because of results from such use under the conditions prescribed in the advertisement, or under such conditions as are customary or usual, or if the use of such advertisement is with intent to defraud or mislead, an interim report stating whether and how respondents intend to comply shall be filed within ten days.

13 Within its sound discretion, the Commission may require any respondent upon whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order or with said stipulation.

Reports of compliance shall be signed in ink by respondents or by the parties stipulating.

14 Exhibit B.

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1. Morton Salt Co.
(Signature or name of addressee)
2. S. Thomson
(Signature of addressee's agent—Agent should enter addressee's name on line One above)

Date of delivery 9-4, 1947.

(Pencil notation) 4320 Order requiring additional reports of compliance from certain respondents 52.

Post Office Department
Official Business

Penalty for Private Use
To Avoid Payment
of Postage, $300

Postmark of Delivering Office

55 Chicago
Sep 4
8 PM
1947
Ill.

Return to Federal Trade Commission
(Name of Sender)
Street and Number,
or Post Office Box
Washington, D. C.

Registered Article
No. 370804
Insured Parcel
No.

15 Exhibit C.

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 22nd day of September, A. D. 1947.

Commissioners:

Garland S. Ferguson, Chairman,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer,
Lowell B. Mason.

In the Matter of
Salt Producers Association, *et al.* } Docket No. 4320.

ORDER EXTENDING TIME FOR FILING ADDITIONAL REPORTS OF ~~COMPLIANCE~~.

This matter coming on to be considered by the Commission upon the request of counsel for respondent Hardy Salt Company for an extension of time until November 1, 1947, within which to file additional reports of compliance pursuant to the Commission's order requiring same under date of September 2, 1947, and the Commission having duly considered said request, and being fully advised in the premises:

It Is Ordered that the time for filing additional reports of compliance pursuant to the order requiring such reports entered on September 2, 1947, be, and the same hereby is, extended for all respondents subject to such order until November 1, 1947.

By direction of the Commission:

Otis B. Johnson,
*Secretary.*

(Seal)

16 Exhibit D.

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1 Morton Salt Co.
(Signature or name of addressee)

2. S. Thomson
(Signature of addressee's agent—Agent should enter addressee's name on line One above)

Date of Delivery 9-24, 1947.

(Pencil notation) 4320 Order Extending Time for Additional Report of Compliance 62 7.

Post Office Department
Official Business

Penalty for Private Use
To Avoid Payment
of Postage, $300

Postmark of Delivering Office

55 Chicago
Sep 14
8 PM
1947
Ill.

Return to Federal Trade Commission
(Name of Sender)

Street and Number,
or Post Office Box .....

Washington, D. C.

Registered Article
No. 370662
Insured Parcel

No. .....

17 **Exhibit E.**

**Return Receipt**

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Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1 Morton Salt
(Signature or name of addressee)

2 M. Nelson
(Signature of addressee's agent—Agent should enter addressee's name on line One above)

Date of delivery 3-1, 1948.

(Pencil notations) 4320 Notice of Default (Morton Salt Co.) 72 11.

Post Office Department
Official Business

Penalty for Private Use
To Avoid Payment
of Postage, $300

| Postmark of Delivering Office |
|---|
| 53 Chicago<br>Mar 1<br>10 PM<br>1948<br>Ill. |

Return to Federal Trade Commission
(Name of Sender)

Street and Number,
or Post Office Box .....

Washington, D. C.

Registered Article
No. 370550
Insured Parcel

No. .....

18 And afterwards, on, to wit, the 26th day of May, 1948, there was filed in the Clerk's office of said Court a certain Summons With Marshal's Return Endorsed Thereon in words and figures following, to wit:

19 DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-698) * *

## SUMMONS.

To the above named Defendant:

You are hereby summoned and required to serve upon Otto Kerner, Jr., U. S. Attorney, plaintiff's attorney, whose address is 450 U. S. Court House, Chicago, Ill., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Roy H. Johnson,
*Clerk of Court.*

By Marguerite Gilmour,
*Deputy Clerk.*

Date: May 18, 1948. [Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Endorsed: District Court of the United States. * * (Caption—48-C-698) * * Summons In Civil Action. Returnable not later than 20 days after service. By L. M. McBride, Sec. Otto Kerner, Jr., U. S. Atty., Attorney for Plaintiff.

Return On Service Of Writ.

I hereby certify and return, that on the ____ day of _____ 19 ___, I received the within summons. Served this writ together with copy of complaint on the within named Morton Salt Company, a corporation, by delivering copies thereof to L. M. McBride, Sec., an agent of said corporation, this 19th day of May, A. D. 1948.

The president of said corporation not found in my district.

Marshal's Fees
Travel $
Service 1 $2.00

T. P. O'Donovan,
*United States Marshal.*
By Wm. Raff,
*Deputy United States Marshal.*

Subscribed and sworn to before me, a _____
this day of _____ 19 ___.
(Seal)
_____

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

20 And afterwards on, to wit, the 8th day of June, 1948, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Answer And Proof Of Service Of The Answer in words and figures following, to wit:

21 In the United States District Court.

* * (Caption—48-C-698) * *

ANSWER.

Now comes the Morton Salt Company, by its attorneys, L. M. McBride, E. H. Baker, Jr., Harvey Wienke and James T. Welch, and in answer to the complaint heretofore filed herein, states as follows:

1. Defendant admits all the allegations of paragraph 1 of said complaint.

2. Defendant admits all the allegations of paragraph 2 of said complaint, except that defendant states that its principal place of business is now 120 South LaSalle Street, Chicago, Illinois and not 310 South Michigan Avenue, Chicago, Illinois.

3. Defendant admits all the allegations of paragraph 3 of said complaint.

4. With respect to the allegations of paragraph 4 of said complaint, defendant admits that Exhibit "A" referred to in said paragraph and attached to said complaint is a true and complete copy of Rule XXVI of the Rules of Practice of the Federal Trade Commission; that on September 2, 1947 the Federal Trade Commission issued an order in words and figures as set forth in
22 said paragraph; that said order was purportedly issued pursuant to the provisions of said Rule XXVI and to sub-sections (a) and (b) of section 6 of the Act referred to in said paragraph; and that said Rule XXVI was purportedly promulgated under and in accordance with the provisions of sub-section (g) of section 6 of the Act referred to in said paragraph. Defendant denies that said order of September 2, 1947 was issued pursuant to the provisions of said Rule XXVI or to sub-sections (a) and (b) of section 6 of said Act, or either of them; and defendant denies that said Rule XXVI was promulgated under and in accordance with the provisions of said subsection (g) of section 6 of said Act.

5. Defendant admits all the allegations of paragraph 5 of said complaint.

6. Defendant admits all the allegations of paragraph 6 of said complaint.

7. Defendant admits all the allegations of paragraph 7 of said complaint.

8. With respect to the allegations of paragraph 8 of said complaint, defendant admits that on February 27, 1948, the Federal Trade Commission issued the notice of default set forth in said paragraph. Defendant denies all other allegations of said paragraph 8, and alleges that under date of October 31, 1947, defendant, by its attorney, filed the report required by said order of September 2, 1947, of the Federal Trade Commission, a copy of which report is attached hereto as Exhibit "A" and hereby made a part hereof, which report the Federal Trade Commission has received and retained without making any objection thereto.

9. Defendant admits all the allegations of paragraph 9 of said complaint.

23 10. Defendant denies all the allegations of paragraph 10 of said complaint.

11. Defendant denies all the allegations of paragraph 11 of said complaint.

12. Defendant alleges that said order of September 2, 1947 was issued by the Federal Trade Commission without notice to the defendant and without the defendant having been given an opportunity for any hearing with respect thereto; that this action by the Federal Trade Commission was a denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States; and that, therefore, said order of September 2, 1947 is entirely null and void.

13. Defendant further alleges that under date of September 18, 1940, the Federal Trade Commission filed a complaint against certain respondents, including this defendant, in which it was alleged that respondents were engaging in acts which constituted unfair methods of competition within the intent and meaning of the Federal Trade Commission Act, all as more fully appears from the records of the Federal Trade Commission, "In the Matter of the Salt Producers Association, a corporation, et al", Docket No. 4320; that under date of November 10, 1941, the Federal Trade Commission issued its Findings as to the Facts and its Cease and Desist Order in said proceedings, in which it found the existence of and prohibited the continuance of certain acts alleged to be in violation of section 5 of the Federal Trade Commission Act; that thereafter certain of said respondents, including this defendant, filed a Petition for Review of said Cease and Desist Order with the United States Circuit Court of Appeal, for the Seventh Circuit, all as more fully appears from the records of said Court, Docket No. 7909; that thereafter on March 8, 1943, 24 the said Court issued its opinion in said review proceedings, *Salt Producers Association, a corporation, et al.* v. *Federal Trade Commission*, 134 Fed. (2d) 354, which opinion is hereby incorporated in and made a part hereof by reference; that thereafter on April 28, 1943, the said Court entered its Final Decree in said review proceedings, which said Final Decree provided as follows:

"It Is Hereby Further Ordered, Adjudged And Decreed that said modified order, in the terms above set forth, is hereby made the decree of this Court, and Petitioners are hereby commanded to obey the same, without prejudice to the right of the United States, as provided in Section 5 (1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violations of the said

modified order to cease and desist hereby affirmed, and without prejudice to the right of the Federal Trade Commission to initiate contempt proceedings for violations of this decree.

"It Is Hereby Further Ordered, Adjudged And Decreed that within ninety (90) days after the entry of this decree, the petitioners shall file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which they have complied therewith.

"This Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof, and retains jurisdiction to modify the decree if changed future conditions should warrant such modification."

and that said Decree became final long prior to the commencement of the present proceedings.

14. Pursuant to the requirements of the Final Decree of the United States Circuit Court of Appeal for the Seventh Circuit, hereinabove described in paragraph 13 hereof, defendant filed its report of compliance with the Federal Trade Commision, which report the Federal Trade Commission has received and retained without making any objection thereto.

15. Defendant further alleges that said Federal Trade Commission proceedings, Docket No. 4320, were filed under Title 15 U. S. C. A. section 45, being section 5 of the Federal Trade Commission Act; that said order of September 2, 1947 of the Federal Trade Commission was entered under sub-sections 6(a) and 6(b) of said Act in connection with what purported to be an investigation of the compliance by the various respondents with said Final Decree of the United States Circuit Court of Appeal for the Seventh Circuit; and that the Federal Trade Commission is without authority or jurisdiction to proceed under sections 6(a) and 6(b) of said Act in connection with the enforcement of a decree entered under section 5 of said Act.

16. Defendant further alleges that under the terms and provisions of the Final Decree of the said United States Circuit Court of Appeal for the Seventh Circuit, said Court has retained jurisdiction over this defendant and over said proceedings, identified as Docket No. 7909 of said Court; that the Federal Trade Commission has not made application to said Circuit Court of Appeals for any order or relief

thereunder; and that this Court has no jurisdiction over the subject matter of the complaint filed herein.

17. Defendant further alleges that said order of September 2, 1947 was issued in violation of the terms and provisions of the Fourth Amendment to the Constitution of the United States in that it amounts to an illegal search and seizure of the books and records of the defendant.

18. Defendant further alleges that the things required of it by said order of September 2, 1947 do not, nor does any of them, constitute a requirement to file an annual or special report within the meaning of said section 10 of said Act for which the $100.00 per day penalty provision has been provided.

19. Defendant further alleges that the procedure sought to be pursued by the Federal Trade Commission in the
26 proceedings hereinabove referred to in this answer, are not reflected or set forth in any rule of said Federal Trade Commission; nor has such procedure been published in the Federal Register as required and provided for under the terms and provisions of section 3 of the Administrative Procedure Act, 5 U. S. C. A., sections 1001-1011; and the procedure attempted to be followed by said Federal Trade Commission as hereinabove referred to in this complaint is in violation of the terms and provisions of section 6 of said Administrative Procedure Act.

Wherefore the defendant prays that the complaint herein be dismissed and that judgment for costs be entered in favor of the defendant and against the plaintiff.

Morton Salt Company,
By L. M. McBride,
120 South LaSalle Street,
Chicago 3, Illinois.

L. M. McBride,
120 South LaSalle Street,
Chicago 3, Illinois.
Edward H. Baker, Jr.,
120 South LaSalle Street,
Chicago 3, Illinois.
Harvey Wienke,
120 South LaSalle Street,
Chicago 3, Illinois.
James T. Welch,
Bowen Building,
815 Fifteenth Street,
Washington 5, D. C.

27 State of Illinois, } ss.
County of Cook. }

Daniel Peterkin, Jr., being first duly sworn, on oath deposes and says that he is the President of the Morton Salt Company; that he makes this affidavit on behalf of the defendant in the foregoing answer; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and to those matters he believes them to be true.

Daniel Peterkin, Jr.

Subscribed and sworn to before me, Mildred Y. Cahill, a notary public in and for the County of Cook, State of Illinois, this 8th day of June, 1948.

(Seal) Mildred Y. Cahill.

My Commission Expires: Sept. 15, 1949.

28 (Exhibit "A")

McBride & Baker,
310 South Michigan Avenue,
Chicago 4, Illinois.

October 31, 1947.

Honorable Garland S. Ferguson,
Chairman,
Federal Trade Commission,
Washington 25, D. C.

Re: In the Matter of
Salt Producers Association,
et al, No. 4320.

Dear Sir:

Under date of September 2, 1947, an Order was entered in the above case "Order Requiring Additional Reports of Compliance from Certain Respondents". Among the respondents named in that Order were Morton Salt Company, Mulkey Salt Company, and Ruggles & Rademaker Salt Company, all of whom are represented by our law firm.

Since receiving copies of that Order, we have devoted a

substantial amount of time in reviewing the history of the above case, as well as in reviewing the law applicable to that case. After giving the entire matter careful consideration, we, unfortunately, cannot escape the conclusion that the Order is beyond the jurisdiction of the Federal Trade Commission. However, rather than simply ignore the Order we felt that the Commision was entitled to at least be apprised of our legal conclusions by an informal letter such as this.

We feel also that the Commission should also know that we have inquired of our clients as to their compliance with the Order of the Circuit Court of Appeals, and that as to each client, we have been advised that they have continued to comply with that original Order and with the Compliance Report initially filed by each of them in this case.

For the convenience of the Commission, we are enclosing three carbon copies of this letter.

Very truly yours,

/s/ L. M. McBride.

LMM/JC
Enc.

29 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-698) * *

## PROOF OF SERVICE OF THE ANSWER.

The undersigned attorney for United States of America, plaintiff, hereby acknowledges receipt and service of a copy of the Answer of the Morton Salt Company this 8th day of June, 1948 at 2:03 o'clock p. m., Central Daylight Saving Time.

Otto Kerner, Jr.,
By E. Tillotson,
*Attorney for United States of America, Plaintiff.*

30 And afterwards on, to wit, the 23rd day of June, 1948 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion For Summary Judgment And Affidavit of L. M. McBride in words and figures following, to wit:

31 IN THE UNITED STATES DISTRICT COURT.
(Caption—48-C-698)

## MOTION FOR SUMMARY JUDGMENT.

The defendant Morton Salt Company, a corporation, by its attorneys L. M. McBride, E. H. Baker, Jr., Harvey Wienke and James E. Welch, hereby moves the court to enter summary judgment for the defendant on the ground that there is no genuine issue as to any material fact and the defendant is entitled to a judgment as a matter of law, as more particularly appears from the Complaint, Answer and the Affidavit of L. M. McBride attached hereto as Exhibit "A", and said defendant asks such other and further relief as to the court may seem just, with defendant's costs.

Dated this 16th day of June, 1948.

Morton Salt Company,
By: L. M. McBride.

L. M. McBride,
120 South LaSalle Street,
Chicago 3, Illinois.

32 The undersigned attorney for plaintiff hereby acknowledges receipt and service of a copy of the foregoing Motion of defendant for Summary Judgment this 23 day of June, 1948, at 3:15 o'clock, P. M., Central Daylight Saving Time.

Otto Kerner, Jr.
*Attorney for Plaintiff.*

33 Exhibit "A".

IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-698) * *

## AFFIDAVIT.

L. M. McBride, being first duly sworn, on oath deposes and says that he became associated with the law firm of Stearns & Jones in June of 1934; that on January 1, 1940, he became a partner in said law firm of Stearns & Jones; that on November 30, 1940, said law firm of Stearns & Jones was dissolved, and that Edward H. Stearns and affiant on said date formed the law firm of Stearns & McBride; that in July of 1942, by reason of the death of said Edward H. Stearns said law firm of Stearns & McBride was dissolved; that thereafter until July 1, 1943, affiant conducted his law practice as a sole proprietor under the name and style of Stearns & McBride; that on July 1, 1943, affiant and Edward H. Baker, Jr., entered into a partnership for the conducting of their law practice under the name and style of Stearns & McBride; that on July 1, 1946, the name of said partnership of affiant and Edward H. Baker, Jr., was changed to McBride & Baker, with the law practice of said affiant and Edward H. Baker, Jr., having been thereafter conducted under said name and style to and including the date of this affidavit;

34. That during the entire period referred to in the preceding paragraph, the successive law firms of Stearns & Jones, Stearns & McBride, affiant doing business under the name and style of Stearns & McBride, affiant and Edward H. Baker, Jr., doing business under the name and style of Stearns & McBride, and affiant and Edward H. Baker, Jr., doing business under the name and style of McBride & Baker, successively have been general counsel for the defendant herein, Morton Salt Company; and that all the proceedings and matters referred to and described in the Complaint and the Answer heretofore filed in these proceedings, including these proceedings, have been personally handled and under the personal supervision of affiant in so far as the relationship to and participation in said proceedings and matters by Morton Salt Comapny are or have been concerned;

That, in connection with the matters alleged or referred to in the Complaint and Answer heretofore filed in these proceedings, the following are true facts within the personal knowledge of the affiant:

1. Affiant wrote and signed the letter set forth as Exhibit "A" in said Answer, and mailed the same on October 31, 1947, in an envelope addressed to the Federal Trade Commission, Washington 25, D. C., postage prepaid. Neither affiant, Morton Salt Company nor any of its officers has received any communication of any kind or description with respect to said letter from the Federal Trade Commission or from any of its agents or representatives.

2. Neither Morton Salt Company nor any of its officers or agents received any notice or other form of communication from the Federal Trade Commission or any of its agents or representatives with respect to the Order of September 2, 1947, of the Federal Trade Commission, referred to in paragraph 12 of the Answer herein, prior to the entry of said Order; and neither the Morton Salt Company nor any of its officers or agents were invited to participate in any hearing with respect to said Order of September 2, 1947, nor did any of them in fact participate in any such hearing.

3. On September 20, 1940, Morton Salt Company received by mail a document entitled "Complaint" in proceedings before the Federal Trade Commission identified as "In the Matter of Salt Producers Association, a Corporation, et al., docket No. 4320". Morton Salt Company was named as a party respondent in said document. Said document alleged among other things in the second paragraph on page 6 thereof that the acts alleged in said document "constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act"; and the third paragraph on page 6 of said document states as follows: "Whereas, The Premises Considered, the Federal Trade Commission on this 18th day of September, A. D., 1940, issues its complaint against said respondents". Said document bears what purports to be the official seal of the Federal Trade Commission and the signature of Otis B. Johnson, secretary of said Federal Trade Commission.

4. On November 10, 1941, the Federal Trade Commission in the proceedings described in the preceding para-

graph made its findings as to the facts and entered a cease and desist Order. In the first paragraph of said cease and desist Order it is stated, among other things, that "The Commission having made its findings as to the facts and its conclusion that the aforesaid respondents, * * * (referring to Morton Salt Company among others) have violated the provisions of Section 5 of the Federal Trade Commission Act."

5. Affiant, for and on behalf of Morton Salt Company, filed a Petition for Review of the above described cease and desist Order with the United States Circuit Court of Appeals, for the Seventh Circuit, which was entered as docket No. 7909 in said Court.

36 6. On April 20, 1943, said United States Circuit Court of Appeals, for the Seventh Circuit, entered its Final Decree in said review proceedings, which said Final Decree contained the provisions set forth in paragraph 13 of the Answer filed herein. No review proceedings of any kind or description were had with respect to said Final Decree referred to in this paragraph.

7. Subsequent to April 20, 1943, and within the ninety-day period specified in said Final Decree, and pursuant to said Final Decree, Morton Salt Company mailed to the Federal Trade Commission in a sealed envelope addressed to said Federal Trade Commission, Washington 25, D. C., postage prepaid, its report of compliance duly signed by the president of said Morton Salt Company, a copy of which is attached hereto and hereby made a part hereof as Exhibit "1". Neither affiant, Morton Salt Company nor any of its officers or agents has received any objection or communication from the Federal Trade Commission, its agents or representatives, with respect to said report of compliance.

8. Salt Producers Association was one of the respondents in said docket No. 4320 proceedings referred to above, and at all times since September 18, 1940, to date James B. Wescott of the law firm of Miller, Gorham, Wescott & Adams, One North LaSalle Street, Chicago, Illinois, was the general counsel for said Salt Producers Association, and has during all the time mentioned in the Complaint and the Answer filed herein and in this affidavit represented said Salt Producers Association in all the proceedings referred to in said Complaint, Answer and affidavit. Attached hereto and hereby made a part hereof as

Exhibit "2" is a true and correct copy of a letter received by said James B. Wescott, the original of which letter has been examined by affiant and is in the files of said James B. Wescott.

9. Neither affiant, Morton Salt Company, nor its officers or agents has received any notice or other communi-
37 cation from the Federal Trade Commission, or otherwise, with respect to or concerning any application by the Federal Trade Commission to the United States Circuit Court of Appeals, for the Seventh Circuit, for any proceedings, order or relief under, pursuant to or in connection with the said Final Decree of said Circuit Court of Appeals with respect to the Morton Salt Company, either in regard to the enforcement of said Final Decree or otherwise.

10. Affiant has examined all the various releases of the Federal Trade Commission as to what it has published in the Federal Register as required and provided for under the terms and provisions of Section 3 of the Administrative Procedure Act, 5 USCA, Sections 1001-1011; and affiant has found no rule or other procedural provision in said releases specifically providing for the procedure adopted by the Federal Trade Commission as outlined in the Complaint filed herein and as sought to be enforced in the proceedings before this Court.

L. M. McBride.

Subscribed and sworn to before me this 16th day of June, 1948.

Lois E. Jesiek,
(Seal.) *Notary Public.*

My Commission Expires: July 22, 1950.

38 Exhibit "1".

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

In the Matter of
Salt Producers Association, et al. } Docket No. 4320.

REPORT OF MORTON SALT COMPANY, A CORPORATION, AND RUGGLES & RADEMAKER SALT COMPANY, A CORPORATION, TWO OF THE RESPONDENTS HEREIN, AS TO COMPLIANCE WITH ORDER TO CEASE AND DESIST.

On April 20, 1943, the United States Circuit Court of Appeals for the Seventh Circuit, in Case No. 7909, entered a final decree affirming and enforcing a modified order to cease and desist against the Respondents in the above entitled cause, including the Respondents, Morton Salt Company and Ruggles & Rademaker Salt Company. In the next to the last paragraph of said final decree, these Respondents were ordered to file with the Federal Trade Commission, within ninety (90) days after the entry of said final decree, a report, in writing, setting forth in detail the manner and form in which these Respondents have complied with said final decree.

Now, therefore, these Respondents, pursuant to the terms and provisions of said final decree, do hereby submit their report as to the manner and form in which
39 they have complied with said final decree:

1. Except as hereinafter set forth in paragraphs 9 and 10 hereof, neither of these Respondents is now a party to and will not hereafter become a party to, and is not now continuing, carrying out, directing, instigating or co-operating in and will not hereafter carry out, direct, instigate or co-operate in any planned common course of action, mutual agreement, combination or conspiracy to fix or maintain the prices of salt or to curtail, restrict or regulate the production or sale of salt; except that both of these Respondents are parties to and will hereafter become parties to mutual agreements between them-

selves and their respective customers for the purpose of fixing the prices at which salt is to be sold from time to time by these Respondents to their respective customers.

2. Except as hereinafter set forth in paragraphs 9 and 10 hereof, neither of these Respondents is now establishing, fixing or maintaining and will not hereafter establish, fix or maintain, in any manner whatsoever, uniform prices, terms and conditions of sale upon which salt is being sold or is to be sold, for the purpose of carrying out or pursuant to any planned or agreed common course of action referred to in paragraph 1 hereof; except that each of these Respondents is a party to and will hereafter become a party to mutual agreements with their respective customers for the purpose of establishing
40 prices, terms and conditions of sale upon which salt is to be sold by each Respondent to its respective customers.

3. Except as hereinafter set forth in paragraphs 9 and 10 hereof, neither of these Respondents is now adhering to, or promising to adhere to, and will not hereafter adhere to, or promise to adhere to, filed or published prices or terms and conditions of sale for salt pending the filing of changes therein with the Salt Producers Association, or with any other agency, or with any other respondent to the above entitled cause, for the purpose of carrying out or pursuant to any planned or agreed common course of action referred to in paragraph 1 hereof.

4. Except as hereinafter set forth in paragraphs 9 and 10 hereof, neither of these Respondents is now continuing the delivered price zones heretofore used for making quotations and sales of salt, and will not hereafter establish or maintain any delivered price zones which are similar to those heretofore used, for the purpose of carrying out or pursuant to any planned or agreed common course of action referred to in paragraph 1 hereof. However, each of these Respondents is now pursuing and may hereafter pursue the following sales practices and policies:

(a) Each of these Respondents is now employing
41 and may hereafter employ delivered price zones for certain of its products, and in each of said delivered price zones the delivered price of each such product will be the same to all customers of each Respondent throughout such zone, regardless of the differing costs of delivery of the product between the plants of such Respondent and

its customers within each such zone. As to all delivered price zones now employed or which may hereafter be employed by either of these Respondents, the boundaries of those delivered price zones, the products to be sold on a uniform delivered price basis to all customers of each Respondent throughout each such delivered price zone and the delivered prices at which each of those products is to be sold in each such delivered price zone is now being and will hereafter be determined by each Respondent as a factor of and consistent with its own sales policies and not as a part of any planned common course of action, mutual agreement, combination or conspiracy between such Respondent and any other Respondent to the above entitled cause.

(b) When any other Respondent is selling or offering for sale on a delivered price basis or otherwise, any product competitive with or similar to any product of either Respondent which is sold or offered for sale in the manner described in paragraph 4 (a) hereof, and the sale or offering price of such competitive or similar product is
42 equal to, substantially equal to or less than the sale or offering price of said product of either of these Respondents, then either of these Respondents, within such geographical territory or territories as it may deem necessary or advisable, may reduce the delivered price of its said product to such extent as is necessary to maintain its competitive position.

(c) As to all products of either of these Respondents not quoted on a delivered price basis, as described in paragraphs 4(a) and 4(b) hereof, the price is f. o. b. a plant of such Respondent, and the transportation charges and all applicable excise taxes are for the account of the customer. The f. o. b. plant price, plus full transportation charges established by the Interstate Commerce Commission, plus any applicable service or warehousing charges and plus any applicable excise tax, equal the delivered cost to the customer. When any other Respondent is selling or offering for sale at any given destination, a product competitive with or similar to a product of either of these Respondents also sold or offered for sale at such destination, and the price or delivered cost to the customer of such competitive or similar product is equal to, substantially equal to or less than the customer's delivered

cost of said product of either of these Respondents, then either of these Respondents may reduce the f. o. b. plant price of such product to such extent as is necessary
43 to maintain its competitive position.

5. Except as hereinafter set forth in paragraphs 9 and 10 hereof, neither of these Respondents is now exchanging and will not hereafter exchange, directly or through the Salt Producers Association, or any other agency or clearing house, price lists, invoices and other records of sale showing the quality, current prices and terms and conditions of sale allowed by either of these Respondents to dealers and distributors, for the purpose of carrying out or pursuant to any planned or agreed common cause of action referred to in paragraph 1 hereof, or for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt; but each of these Respondents is now a party to and may hereafter become a party to arrangements for the collection and dissemination by and through the Salt Producers Association of figures and statistics, showing the total volume of sales of salt without disclosing the sales volume of either of these or any other individual producer of salt.

6. Except as hereinafter set forth in paragraphs 9 and 10 hereof, neither of these Respondents is now exchanging and will not hereafter exchange, directly or through the medium of the Salt Producers Association, or any other agency, the names of dealers or distributors who receive special discounts, for the purpose of carrying out or
44 pursuant to any planned or agreed common course of action referred to in paragraph 1 hereof, or for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt.

7. Except as hereinafter set forth in paragraphs 9 and 10 hereof, neither of these Respondents is now curtailing, restricting or regulating and will not hereafter curtail, restrict or regulate the quantity of salt to be produced and sold by either of these Respondents and the other Respondents in the above entitled cause, by any method or means during any given period of time, for the purpose of carrying out or pursuant to any planned or agreed common course of action referred to in paragraph 1 hereof, or for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt.

8. Neither of these Respondents is now doing or causing to be done and will not hereafter do or cause to be done, any of the things forbidden by said final decree through the medium of Stevenson, Jordan and Harrison, Inc., Charles R. Stevenson or D. M. Metzger, or any other corporation, firm or individual.

9. Both of these Respondents are now parties to and may hereafter become parties to contracts and agreements relating to the maintenance of resale prices as are not
45 prohibited by the provisions of an Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (The Sherman Act), as amended.

10. The Respondent, Ruggles & Rademaker Salt Company, is a wholly owned subsidiary corporation of the Respondent, Morton Salt Company. In addition to Ruggles & Rademaker Salt Company, the Morton Salt Company has other wholly owned subsidiary corporations. The Morton Salt Company, the Ruggles & Rademaker Salt Company, and the other wholly owned subsidiary corporations of the Morton Salt Company, are now parties to and, together with any additional subsidiary corporations hereafter organized or acquired, will hereafter continue to be and become parties to planned common courses of action and mutual agreements by and between themselves alone, to fix and maintain the prices of salt sold by the Morton Salt Company and said subsidiary corporations and to curtail, restrict and regulate the production or sale of salt by the Morton Salt Company and said subsidiary corporations, for the sole purpose of effecting and carrying out the mutual sales and production policies between said Morton Salt Company and said subsidiary corporations; and, notwithstanding the terms and provisions of said final decree, the Morton Salt Company
46 and said subsidiary corporation, as between themselves alone and solely for the purpose of effecting the policies of the affiliated group, are doing and will hereafter do some or all the acts otherwise prohibited in said final decree insofar as the relationship of these Respondents and any other Respondent or party not a member of the affiliated group is concerned.

11. These Respondents have in all respects fully complied with said final decree and will hereafter continue so to do.

Respectfully submitted this 23rd day of June, 1943.

Morton Salt Company, a corporation,
By: Daniel Peterkin, Jr.,
*Its President.*
310 South Michigan Avenue,
Chicago, Illinois.

Ruggles & Rademaker Salt Company,
a corporation,
By: Daniel Peterkin, Jr.,
*Its President.*
310 South Michigan Avenue,
Chicago, Illinois.

Attorneys for Respondents:
Stearns & McBride,
310 South Michigan Avenue,
Chicago, Illinois,
By: L. M. McBride.

47 EXHIBIT "2".

FEDERAL TRADE COMMISSION.

Washington 25.

Office of General Counsel.

February 17, 1948.

James B. Wescott, Esq.,
Miller, Gorham, Wescott & Adams,
One North LaSalle Street,
Chicago 2, Illinois.

Re: Docket No. 4320
Salt Producers Association, et al.

Dear Mr. Wescott:

Your letter of February 16, 1948, is received and contents noted. With respect to your statement that you understood my position on the recent trip to Detroit to be that the inquiry conducted by Mr. Truly and myself might be related either to Docket No. 4320 or to a new investigation under Section 5, I have no recollection that there was any doubt but that the inquiry and request for information from Salt Producers Association was related to the proceeding in Docket No. 4320. As you yourself note, the letter of the Secretary of the Commission under date of January 26, 1948, made it perfectly clear that this was the purpose of the inquiry.

With regard to your request for my ideas on your suggestion that further action in this matter be deferred until after the decision of the Supreme Court in the Cement case; I fail to see that anything the Court might hold in the Cement case would affect or be relevant to the question of whether or not the respondents in Docket No. 4320 have been and are now complying with the Commission's order and to cease and desist and the decree of the Circuit Court of Appeals.

Very truly yours,

(s) Jos. S. Wright,
Joseph S. Wright,
*Chief, Division of Compliance.*

48 And afterwards on, to wit, the 24th day of June, 1948 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Notice and Motion in words and figures following, to wit:

49 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-C-698) * *.

NOTICE.

Please take notice that on the 24th day of June, 1948, at the opening of Court in the forenoon or as soon thereafter as counsel can be heard, we will appear before the Honorable Philip Sullivan, in the room usually occupied by him as a court room in the Federal Building, and then and there move the Court for an order in accordance with the motion herewith served upon you, at which time you may appear if you see fit.

Harvey Wienke,
*Attorney for Defendant.*

The undersigned attorney for the plaintiff hereby acknowledges receipt and service of a copy of the foregoing notice and a copy of the motion mentioned therein this 23 day of June, 1948, at 3:15 o'clock P. M., Central Daylight Saving Time.

Otto Kerner, Jr.,
*Attorney for Plaintiff.*

50 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-C-698) * *

MOTION.

The defendant Morton Salt Company, a corporation, by its attorneys L. M. McBride, E. H. Baker, Jr., Harvey Wienke and James T. Welch hereby moves the Court to enter an order extending the time for the filing of defendant's brief in support of its motion for summary judgment heretofore filed herein.

Dated this 24th day of June, 1948.

Harvey Wienke.

Harvey Wienke,
120 South La Salle Street,
Chicago 3, Illinois.

51 And on the same day to wit, the 24th day of June, 1948 came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures following, to wit:

52 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-C-698) * *

STIPULATION.

It is hereby stipulated by and between the parties, through their respective attorneys, that the time within which Defendant may file a brief in support of its Motion for Summary Judgment is extended to and including July 15, 1948.

Dated June 23, 1948.

Otto Kerner, Jr.,
*United States District Attorney*
*Attorney for Plaintiff.*
Harvey Wienke,
*Attorney for Defendant.*

53 And on the same day to wit, on the 24th day of June, 1948, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

54 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-C-698) * *

ORDER.

This cause coming on to be heard on motion of Morton Salt Company, a corporation, defendant in the above entitled cause, by its attorneys L. M. McBride, E. H. Baker, Jr., Harvey Wienke and James T. Welch, and the Court being fully advised in the premises:

It is hereby ordered that the time within which the defendant shall file its brief in support of its motion for summary judgment, heretofore filed in this cause on June 23,

1948, shall be extended to and including the 15th day of July, 1948.

Entered this 24th day of June, 1948.

Philip L. Sullivan,
*Judge.*

55 And afterwards on, to wit, the 15th day of July, 1948 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Two (2) Notices and Motion for Summary Judgment, Affidavit of Otis B. Johnson and Exhibit A, Pages 1, 2, 3 and 4, in words and figures following, to wit:

56 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-698) * *

NOTICE.

To: L. M. McBride, Esq.,
120 South La Salle Street,
Chicago 3, Illinois.

Please Take Notice that on Thursday, July 15, 1948, at the hour of ten o'clock a. m., or as soon thereafter as counsel may be heard, I shall appear before the Honorable Michael L. Igoe, Judge of the District Court of the United States, or before such other judge as may be sitting in his place and stead, in the courtroom usually occupied by him in the United States Court House at Chicago, Illinois, and then and there pray the entry of an order granting the Government leave to file a Consolidated Brief in support of its Motion for Summary Judgment heretofore filed, and further pray the entry of an order extending the Government's time to answer the respondent's Brief filed this day to include the date of August 9, 1948; at which time and place you may appear if you so deem fit.

Otto Kerner, Jr.,
*United States Attorney.*

Received a copy of the above and foregoing Notice this 14th day of July, A. D. 1948.

L. M. McBride,
Attorney for Defendant.

57 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-698) * *

NOTICE.

To: L. M. McBride, Esq.,
120 South LaSalle Street,
Chicago 3, Illinois.

Dear Sir:

Please Take Notice that the attached motion for summary judgment, with supporting affidavit, is being this day filed with the Clerk of the United States District Court for the Northern District of Illinois, at the United States Courthouse, Chicago, Illinois, and will be brought on for hearing before the Court as soon as counsel can be heard.

Dated this 15th day of July, 1948.

United States of America,
By Otto Kerner, Jr.,
*United States Attorney,*
Chicago, Illinois.

Receipt of a copy of the above notice and a copy of a motion for summary judgment with supporting affidavit annexed thereto is hereby acknowledged this 14 day of July, 1948.

L. M. McBride,
By Harvey Wienke,
*Attorney for Defendant.*

58 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-698) * *

## MOTION FOR SUMMARY JUDGMENT.

United States of America, plaintiff, by its attorneys, acting pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves this Court for a summary judgment in favor of the plaintiff on the ground that the complaint, the answer of the defendant, Morton Salt Company, and the affidavit attached to this motion establish that there is no genuine issue as to any material fact, and that on the undisputed facts the plaintiff is entitled as a matter of law to the judgment and to the relief demanded in the complaint and for which it moves herein.

In support of this motion, the affidavit of Otis B. Johnson is attached hereto.

United States of America,
By Otto Kerner, Jr.,
*United States Attorney,*
Chicago, Illinois.

J. Stephen Doyle, Jr.,
*Special Assistant to the Attorney General,*
United States Department of Justice,
Washington, D. C.

Joseph S. Wright,
*Assistant General Counsel,*
Federal Trade Commission,
Washington, D. C.

J. B. Truly,
*Special Attorney,*
Federal Trade Commission,
Washington, D. C.

59 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-698) * *

## AFFIDAVIT.

District of Columbia, City of Washington. } ss.

Otis B. Johnson, being first duly sworn, deposes and says that he is the Secretary of the Federal Trade Commission; that he makes this affidavit on personal knowledge; that the Federal Trade Commission, on August 10, 1943, issued its modified order to cease and desist in a proceeding before the Commission entitled In the Matter of Salt Producers Association, a corporation, et al., Commission Docket Number 4320; that the defendant herein, Morton Salt Company, was one of the respondents before the Commission against whom that modified order to cease and desist was issued; that the said modified order to cease and desist was served on the said Morton Salt Company by registered mail on August 12, 1943; that a true and complete copy of the said modified order to cease and desist is attached to this affidavit as Exhibit A and is made a part hereof; that nine of the corporations named in the Commission's order dated September 2, 1947, which order is copied in full in paragraph 4 of the complaint herein, have complied with that order by filing the special reports required thereby.

Otis B. Johnson.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 13th day of July, 1948.

Denis E. Connell,
*Notary Public.*

(Notarial Seal)

My commission expires March 11, 1951.

60

## EXHIBIT A.

### UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 10th day of August, A. D. 1943.

Commissioners:

Garland S. Ferguson, Chairman,
Charles H. March,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer.

| | |
|---|---|
| In the Matter of<br>Salt Producers Association, a corporation; Avery Salt Company; Barton Salt Company; Carey Salt Company; Cayuga Rock Salt Company; Colonial Salt Company; Detroit Rock Salt Company; Diamond Crystal Salt Company, Inc.; International Salt Company; Jefferson Island Salt Company, Inc.; Hardy Salt Company; Morton Salt Company; Myles Salt Company, Ltd.; Mulkey Salt Company; Ohio Salt Company; Ruggles & Rademaker Salt Company; Saginaw Salt Products Company; Union Salt Company; Watkins Salt Company; Worcester Salt Company; American Salt Corporation; and Stevenson Corporation, a corporation, and its officers, Charles R. Stevenson, T. M. Harrison, C. H. Ferris, N. M. Perris, E. G. Ackerman, A. H. Dyer, R. E. Case, F. L. Sweetser, W. R. Guthrie, A. P. Monweiler, S. M. Hudson, R. R. Bliss, L. B. Platt, Howard Marvin and D. M. Metzger, a partnership, doing business under the firm name of Stevenson, Jordan and Harrison. | Docket No. 4320 |

### MODIFIED ORDER TO CEASE AND DESIST.

This proceeding coming on for further hearing before the Federal Trade Commission, and it appearing that

61 on November 10, 1941, the Commission made its findings as to the facts herein and concluded therefrom that respondents had violated the provisions of the Federal Trade Commission Act, and issued and subsequently served upon them its order to cease and desist; and it further appearing that respondents on January 9, 1942, filed in the United States Circuit Court of Appeals for the Seventh Circuit petition to review and set aside the Commission's order, and that on March 8, 1943, the said court rendered its opinion and on April 20, 1943, issued its decree modifying the aforesaid order of the Commission in certain particulars and affirming the order in other particulars:

Now, Therefore, pursuant to the provisions of Subsection (i) of Section 5 of the Federal Trade Commission Act, the Commission issues this its modified order to cease and desist in conformity with said decree:

It Is Ordered that the respondents Salt Producers Association, a corporation, Avery Salt Company, a corporation, Barton Salt Company, a corporation, The Carey Salt Company, a corporation, Cayuga Rock Salt Company, a corporation, Colonial Salt Company, a corporation, Detroit Rock Salt Company, a corporation, Diamond Crystal Salt Co. Inc., a corporation, International Salt Company, a corporation, Jefferson Island Salt Company, Inc., a corporation, Hardy Salt Company, a corporation, Morton Salt Company, a corporation, Myles Salt Company, Ltd., a corporation, Mulkey Salt Company, a corporation, Ohio Salt Company, a corporation, Ruggles & Rademaker Salt Company, a corporation, Saginaw Salt Products Company, a corporation, Union Salt Company, a corporation, Watkins Salt Company, a corporation, Worcester Salt Company, a corporation, American Salt Corporation, a corporation, their officers, servants, agents, and employees, and Stevenson, Jordan and Harrison, Inc., Charles R. Stevenson and D. M. Metzger, respectively president and treasurer of said Stevenson, Jordan and Harrison, Inc., and their agents, servants, and employees, or any two or more of said respondents, with or without the cooperation of others not parties hereto, in connection with the offering for sale, sale, and distribution of salt in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, or carrying out, or directing, instigating, or cooperating in, any planned common course of action, mutual agreement,

combination, or conspiracy, to fix or maintain the prices of salt or curtail, restrict or regulate the production or sale thereof, and from doing any of the following acts or things pursuant to any such planned or agreed common course of action:

62 (1) Establishing or maintaining uniform prices for salt, or uniform terms and conditions in the sale thereof, or in any manner agreeing upon, fixing, or maintaining any prices, including terms and conditions of sale, at which salt is to be sold;

(2) Adhering, or promising to adhere, to filed or published prices or terms and conditions of sale for salt pending the filing of changes therein with the Salt Producers Association, or with any other agency, or with each other;

(3) Continuing the delivered price zones heretofore used for making quotations and sales of salt, or establishing or maintaining any delivered price zones which are similar to those heretofore used in that their use would result as heretofore in making the delivered prices of the respective corporations identical despite their different costs of delivery;

(4) Exchanging, directly or through the Salt Producers Association, or any other agency or clearing house, price lists, invoices, and other records of sale showing the quantity, current prices and terms and conditions of sale allowed by said corporations to dealers and distributors; provided, however, that nothing herein shall prevent said association from collecting and disseminating to the respective manufacturers figures showing the total volume of sales of salt without disclosing the sales volume of individual producers, for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt;

(5) Exchanging, directly or through the medium of the Salt Producers Association, or any other agency, the names of distributors or dealers who receive special discounts; for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt;

(6) Curtailing, restricting, or regulating the quantity of salt to be produced and sold by said corporations by any method or means during any given period of time for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt;

63 (7) Doing, or causing to be done, any of the things forbidden by this order through the medium of said

Stevenson, Jordan and Harrison, Inc., Charles R. Stevenson or D. M. Metzger, or any other corporation, firm or individual.

It Is Further Ordered that Stevenson, Jordan and Harrison, Inc., and Charles R. Stevenson and D. M. Metzger as officers thereof, and their agents, servants, and employees, do forthwith cease and desist from doing or performing any of the things forbidden by this order, or aiding, assisting, or cooperating in the performance thereof.

It Is Further Ordered that nothing in this order is to be construed as prohibiting the respondents from entering into such contracts or agreements relating to the maintenance of resale prices as are not prohibited by the provisions of an Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (the Sherman Act), as amended.

It Is Further Ordered that for the reasons appearing in the findings as to the facts the complaint herein be, and hereby is, dismissed as to the following respondents: T. M. Harrison, C. H. Ferris, N. M. Perris, E. G. Ackerman, A. H. Dyer, R. E. Case, F. L. Sweetser, W. R. Guthrie, A. P. Nonweiler, S. M. Hudson, R. R. Bliss, L. B. Platt, and Howard Marvin.

By the Commission.

Otis B. Johnson,
*Secretary.*

64 And on the same day, to wit, on the 15th day of July, 1948, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

65 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-698) * *

On motion of the plaintiff by the United States Attorney it is

Ordered that leave be and it is hereby granted to the plaintiff to file a consolidated brief herein and that the time within which to file answer to the defendant's brief be and it is hereby extended to and including August 9, 1948.

66 And afterwards on, to wit, the 27th day of July, 1948 came the Defendant and parties, respectively by their attorneys and filed in the Clerk's office of said Court their certain Motion To Extend Time To File Defendant's Answering Brief And Stipulation To Extend Time To File Defendant's Answering Brief in words and figures following, to wit:

67 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-698) * *

## MOTION TO EXTEND TIME TO FILE DEFENDANT'S ANSWERING BRIEF.

The defendant Morton Salt Company, a corporation, by its attorneys L. M. McBride, E. H. Baker, Jr., Harvey Wienke and James T. Welch hereby moves the Court to enter an order extending the time for the filing of defendant's brief in answer to plaintiff's brief in support of plaintiff's motion for summary judgment to and including August 9, 1948; and the defendant further says that the plaintiff has consented to the entry of this order as evidenced by the stipulation hereto attached and made a part hereof.

Dated July 26, 1948.

Harvey Wienke,
*Attorney for Morton Salt Company.*

Harvey Wienke,
120 South LaSalle Street,
Chicago 3, Illinois.

68 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-C-698) * *

## STIPULATION TO EXTEND TIME TO FILE DEFENDANT'S ANSWERING BRIEF.

It is hereby stipulated by and between the parties, through their respective attorneys, that the time within which Defendant may file its brief in answer to Plaintiff's brief in support of Plaintiff's Motion for Summary Judgment is extended to and including August 9, 1948; and it is further stipulated that an order may be entered in accordance herewith without further notice.

Dated July 26, 1948.

Otto Kerner, Jr.,
*United States District Attorney,*
*Attorney for Plaintiff.*
Harvey Wienke,
*Attorney for Defendant.*

69 And on the same day to wit, on the 27th day of July, 1948, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

70 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-C-698) * *

On stipulation of the parties by counsel filed herein it is Ordered that the time of the defendant within which to file answering berief in re plaintiff's motion for a summary judgment be and it is hereby extended to August 9, 1948.

71 And afterwards on, to wit, the 19th day of August, 1948 there was filed in the Clerk's office of said Court a certain Memorandum Of The Honorable Philip L. Sullivan, District Judge, in words and figures following, to wit:

72 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Captions—48-C-698-699) * *

## MEMORANDUM.

These actions are before the Court upon complaint filed by the United States which seek the enforcement of an order of the Federal Trade Commission dated September 2, 1947, requiring the defendants, and other corporations named in that order, to file special reports with the Federal Trade Commission within thirty days from the date of service. The complaint also seeks judgment against defendants for forfeiture in the sum of $100.00 per day for each day from and after April 1, 1948, that defendants have failed to file with the Federal Trade Commission the reports required by the order of September 2, 1947.

Each defendant has answered and filed a motion for summary judgment. The Government also has filed
73 its motion for summary judgment. All parties are agreed that there is no genuine issue as to any material fact involved in the case.

Since the issues of law raised by the pleadings in the two actions are identical, the Court is considering both cases as one.

The suits grow out of the order of the Federal Trade Commision dated September 2, 1947, requiring these two defendants among others to file special reports with the Commission, the order reciting that it was issued in the public interest pursuant to the authority granted the Commission by subsections (a) and (b) of Section 6 of the Federal Trade Commission Act, and pursuant to Rule XXVI of the Commission's Rules promulgated under subsection (g) of Section 6, claimed to implement the authority granted the Commission by subsection 6(b) "To require, by general or special orders, corporations engaged in commerce * * * to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to

specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in
74 writing "The default order of February 27, 1948, charging that defendants had failed to comply with the order of September 2, 1947, then followed.

Jurisdiction is founded on Section 9 of the Act which vests this Court with jurisdiction to command corporations to comply with any order of the Commission made pursuant to the Act, and on Section 10 which vests this Court with jurisdiction of suits of the United States for the recovery of forfeitures if corporations fail to file required reports within the time fixed by the Commission for filing the same.

Defendants in their answers have set out certain matters relating to a prior proceeding against them by the Commission under Section 5 of the Act, and it is agreed by both sides that the facts therein are as follows:

The Commission on September 18, 1940, issued its complaint under Section 5 of the Act charging defendants, and others, with engaging in an unlawful conspiracy to fix prices on, and to control the production of salt in connection with the sale and distribution of that commodity in interstate commerce. Answers were filed by the defendants therein admitting the alleged conspiracy. On November 10, 1941, the Commission issued its order to cease and desist, requiring the defendants to discontinue the conspiracy alleged in the complaint and admitted in the answers. A petition for review of the Commission's
75 order was filed by the defendants in the Circuit Court of Appeals for the Seventh Circuit, which court rendered its opinion on March 8, 1943, reported as *Salt Producers Association* v. *Federal Trade Commission*, 134 Fed.(2) 354. On April 20, 1945, the Circuit Court of Appeals entered its decree modifying the Commission's order in certain respects, affirming it as modified and directing compliance therewith. On August 10, 1943, the Commission issued its modified order to cease and desist, as required by Section 5(i) of the Act, incorporating the changes directed by the Circuit Court of Appeals, and caused the same to be served on all of the defendants. In August, 1943, the respondents named in the decree of the Circuit Court of Appeals filed reports with the Commission

showing the manner and form in which they were complying with the court's decree.

On September 2, 1947, the Commission alleges that it believed it was in the public interest to make a further investigation of the manner and form of compliance, and in aid of that investigation, pursuant to Section 6(a) and 6(b) of the Act in aid of enforcement proceedings in Docket No. 4320 under Section 5 of the Act and pursuant to the Commission's Rule XXVI, issued its order requiring the defendants and others to file special compliance reports with the Commission within thirty days from the date of service, which was had on September 4, 1947. Later
76 the Commission by letter order extended the time until November 1, 1947. The Government urges that the reports were not filed and that separate notices of default, as it insists is provided for in Section 10 of the Act, as a prerequisite to subjecting defendants to the $100.00 a day forfeiture for failure to file, were issued by the Commission on February 27, 1948, and served on each defendant on March 1, 1948. The Commission alleges that the thirty days specified in Section 10 and in the notices expired on April 1, 1948, and insists that defendants' failure to file the required reports continued, and that each defendant notified the Commission in writing that it would not comply with the order, and therefore these suits were filed to compel them to do so and to obtain judgment in favor of the United States for $100.00 per day from each for each day they are in default.

In their answers the defendants set out that pursuant to the requirements of the final decree of the United States Circuit Court of Appeals for the Seventh Circuit, defendants filed their reports of compliance with the Federal Trade Commission, and that the Commission received said reports without making any objection thereto. That the order of September 2, 1947, does not require them to file an annual or special report within the meaning of
77 Section 10 of said Act. That the procedure sought to be pursued by the Federal Trade Commission is not reflected or set forth in any Rule of said Federal Trade Commission, and has not been published in the Federal Register, as required by Section 3 of the Administrative Procedure Act, and that pursuant to the order of September 2, 1947, each defendant has filed an additional compliance report, by stating that it is complying in the same manner set out in its original compliance report.

The Commission insists that the present suits in this court have nothing whatsoever to do with the prior proceeding under Section 5 of the Act, except insofar as the Commission's authority to investigate compliance with the decree and modified order to cease and desist have been questioned. The Commission insists that these suits are not for the purpose of enforcing compliance with the decree of the Circuit Court of Appeals or the Commission's modified order to cease and desist, nor have the defendants been charged with a violation of that decree or modified order. That the Commission is only seeking by an investigatory process authorized by law, to obtain the facts as to the manner and form in which defendants have complied with that decree and modified order.

Defendants urge that there is no published rule or statement of procedure of the Commission which specifies,
78 outlines or even refers to the use of Sections 6(a) and 6(b) or Section 10 of the Federal Trade Commission Act in aid of decrees entered under Section 5 of the Act, nor is there any reference in the Commission's Rules and Statements of Procedure to the procedure followed in the present proceedings. The former proceedings referred to as Docket No. 4320 when the matter was before the Federal Trade Commission, and as Case No. 7909 when it was in the Circuit Court of Appeals, were brought by the Federal Trade Commission under Section 5 of the Federal Trade Commission Act, and when the matter was on appeal before the Circuit Court of Appeals, that court, in its decree, reserved "jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof. * * *"

Section 5 of the Federal Trade Commission Act itself provides for enforcement proceedings with respect to decrees entered thereunder, and subsection (1) thereof reads:

> "(1) Any person, partnership or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

79 A careful reading of the legislative history of the Act shows that Section 6 is only to be invoked in support of general economic surveys and not in aid of enforcement proceedings under a Section 5 decree. The Section 10 penalty provisions, on which the present proceeding is based, can be invoked only in connection with general economic survey proceeding under Section 6, and not in connection with enforcement proceedings under Section 5.

Where an appeal has been taken to the Circuit Court of Appeals, as was done in Docket No. 4320, Section 5 gives to the Circuit Court of Appeals sole jurisdiction of enforcement proceedings thereunder, and that court in order to enforce compliance with its decree specifically reserved jurisdiction of the cause, subject only to the Commission's right to pursue contempt proceedings in the Circuit Court of Appeals, or to collect the civil penalty provided by Section 5(1).

The Commission's order of September 2, 1947, here involved, required these defendants to "file additional reports showing in detail the manner and form in which it has been and is now complying with said modified order to cease and desist." On October 31, 1947, these defendants advised the Commission in writing that they were complying in the same manner as set forth in their original compliance reports filed in 1943, to which original reports
80 no objection had ever been made by the Commission.

The September 2, 1947 order also required the defendants, as a part of their additional reports, to submit a complete statement "of the prices, terms and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements distributed, published or employed in marketing salt from and after January 1, 1944."

Sections 6(a) and 6(b) provide for economic reports. Section 6(a) provides: "That the Commission shall also have power

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relations to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, cor-

porations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or an-
81 swers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission."

A reading of the legislative history of Sections 6(a) and 6(b) convinces me that these sections are designed for the purpose of compelling corporations to make annual reports, and giving the Commission authority within its discretion to require special reports when it deemed that advisable, but is not related in any way to the enforcement of the law. The Federal Trade Commission Act, Section 10, provides that corporations shall be subject to the forfeiture of $100.00 a day only for failure to file annual reports and special reports when required by the Commission, in conformity with Section 6, but has no relation to the jurisdiction conferred by Section 5. At least two courts have in effect specifically denied the existence of any relationship between Section 5 and Section 6 of the Act. *Federal Trade Commission* v. *Miller's National Federation*, 47 Fed. (2) 428, where the court said:

> "The power of investigation conferred upon the Commission by Section 6 is different in character from the jurisdiction conferred by Section 5. Section 6 contemplates an investigation for the collection of facts for the information of Congress in aid of the exercise of its legislative function, or for the President in aid of recommending necessary legislation."

And in *Federal Trade Commission* v. *Claire Furnace*
82 *Co.*, 274 U. S. 160, where the Supreme Court makes the same distinction, quoted in this memorandum *infra*.

When Congress enacted the Federal Trade Commission Act the duties and powers of the new Commission seem to have been divided into two categories. The first category continued the power of investigation and publicity with respect to corporations formerly lodged in its predecessor, the Bureau of Corporations, and now contained in Sections 6(a) and 6(b) of the present Act. However, Congress added a new section, Section 10 providing for a forfeiture of $100.00 a day for failure to file the reports provided for in Sections 6(a) and 6(b). The second category into which the duties of the Federal Trade Commission were divided was provided by Section 5 which prohibits unfair methods of competition and provides the method for its enforcement and penalties. Subsection (a) of Section 5 provides that unfair methods of competition in commerce and unfair and deceptive acts or practices in commerce are declared to be unlawful, and also provides that the Commission has power to prevent the use of such unfair methods. Subsection (b) sets out the jurisdiction and procedure by which the Commission may prosecute acts involving unfair methods of competition. Subsection (c) provides the appellate procedure available to respondents against whom a cease and desist order has been entered.
83 Subsection (d) provides that "The jurisdiction of the Circuit Court of Appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive." Subsections (g), (h), (i) and (j) set out the points of time at which a cease and desist order of the Commission becomes final.

I find nothing in Section 5 which gives the Commission power to modify or attempt to enforce, independently of the Circuit Court of Appeals, its original cease and desist order of 1943. Section 5 of the Federal Trade Commission Act is self-sufficient for enforcement proceedings with respect to decrees entered thereunder, and therefore the remedies available to the Commission are contempt proceedings in the Circuit Court of Appeals or penalty proceedings under Section 5(1) of the Act.

The United States contends that the Commission's order of September 2, 1947 indicates that the purpose of the Commission's investigation was to determine the manner and form of compliance with the Commission's modified order to cease and desist of November 10, 1941. That the Commission's order of September 2,

1947 only asked that the defendants file reports indicating the manner and form of defendants' compliance with
84 the modified order of the Commission to cease and desist and with the decree of the Circuit Court of Appeals. Defendants did file an additional compliance report with the Commission setting out that they were complying in the same manner as set forth in their original compliance reports filed in 1943. What defendants did not file is the documentary evidence requested by the Commission and not covered by Section 10 at all. Section 10 provides that only upon the failure of a corporation to file the annual or special reports referred to therein shall the penalty provision become operative. *United States* v. *National Biscuit Company*, 25 Fed. Supp. 329.

*Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160, was a bill in equity brought by various coal, steel and related industries to enjoin the Federal Trade Commission from enforcing order issued by the Commission requiring those companies to furnish monthly reports of production, balance sheets and other voluminous information in detail. Without questioning appellee's right to seek relief by injunction, the Federal Trade Commission answered, admitting the issuance of the orders, claiming authority therefor under Section 6, and 9, Federal Trade Commission Act. The cause was heard on a motion to strike the answer, the court holding the answer insufficient, and granted the injunction. The Supreme Court said:

85 "Appellees were not charged with practicing unfair methods of competition (Section 5, Act of September 26, 1914) or violating the Clayton Act * * *. Orders under such charges can be enforced only through a Circuit Court of Appeals * * *.

"The action of the Commission here challenged must be justified, if at all, under the paragraphs of Sections 6 and 9, * * * and the only methods prescribed for enforcing orders permitted by any of these paragraphs are specified in Sections 9 and 10. They are applications to the Attorney General to institute an action for mandamus, and proceedings by him to recover the prescribed penalties."

Sections 6(a) and 6(b) of the Act provide for economic investigations by the Commission from time to time as to the organization, business, conduct, practice and management

of any corporation engaged in commerce, and for the filing of annual or special reports. The penalty applicable for failure to file these reports has no relation to failure to comply with an order requiring information as to the manner in which an order to cease and desist is being observed, and the supplemental compliance report here involved is not one required by the Act and is clearly not the kind of report set out in Section 6(a) or Section 6(b).

Defendants concede, and I agree, that notwithstanding the reservation of jurisdiction by the Circuit Court of Appeals in its decree, the Commission may investigate any
86 violations which it has reason to believe defendants are committing. In order to accomplish this the Commission may file a new complaint against defendants, alleging in what manner it considers that defendants are violating the Act. Or penalty proceedings under Section 5(1) may be initiated by the United States for alleged violations of the former decree in the Circuit Court of Appeals. Or contempt proceedings may be brought in the Circuit Court of Appeals.

The Commission insists that this is not a Section 5 proceeding, nor is it an attempt on the part of the Commission to enforce the decree of the Circuit Court of Appeals or the Commission's modified order to cease and desist; that it is purely an investigation to determine whether the defendants are complying with the former decree and the Commission's order. It seems to me, however, that the Commission is attempting indirectly to use the power given to it under Section 5 in order to secure the information it seeks under Section 6(a) and 6(b).

The Commission insists that under Section 6(g) it has the power to make rules and regulations for the purpose of carrying out the provisions of this Act. That under this authority it has promulgated Rule XXVI providing for the filing of reports and supplemental reports showing com-
87 pliance with the Commission's orders. Defendants challenge this authority on the ground that nowhere in the Act is any statutory authority given to the Commission to require either compliance or supplemental compliance reports. The Commission also insists that Rule XXVI has nothing to do with Section 5 compliance reports, but is only in aid of economic survey reports under Section 6(b).

Subparagraph (a) of Rule XXVI provides for an origi-

nal report of compliance with the Commission's cease and desist order. Subparagraph (b) sets out the right of the Commission to require from time to time, further supplemental reports of compliance. Subparagraph (c) provides how the reports shall be signed. Defendants urge that no court has ever declared this rule to be lawful, valid and enforceable; and that not until the present time, almost thirty-four years after the enactment of the Federal Trade Commission Act, has the Commission made an attempt to enforce subparagraph (b) thereof in a Section 5 proceeding. Nowhere in Section 5 can I find any reference whatever to compliance reports. Section 5 provides for the finality of a cease and desist order as soon as the jurisdiction of the Federal Trade Commission over it has been transferred to the Circuit Court of Appeals, but nowhere does Section 5 confer upon the Commission authority to make rules, and no rule-making paragraph of any statute could confer upon an administrative body authority to substantially alter the explicit provisions of a statutory enactment such as Section 5 of the Federal Trade Commission Act.

For all of the reasons set out herein I am of the opinion that plaintiff's motion for summary judgment for a mandatory injunction commanding defendants to file the reports requested by the Commission's order of September 2, 1947, and for judgment against the defendants in the amount of $100.00 a day for each day from and after April 1, 1948, should be denied.

Defendants' motions for summary judgment that defendants are not liable for the $100.00 a day penalty are allowed, and the complaint herein is dismissed for the reason that I believe this Court is without jurisdiction to entertain the same.

Philip L. Sullivan,
*Judge.*

August 19, 1948.

89 And afterwards, to wit, on the 20th day of August, 1948, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

90 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-698) * *

## ORDER.

This cause coming on to be heard on the complaint and the answer heretofore filed herein, and on the motion for summary judgment, with a supporting affidavit, heretofore filed herein by the plaintiff, and on the motion for summary judgment, with a supporting affidavit, heretofore filed herein by the defendant, and on the brief and answering brief of the plaintiff, and on the brief and answering brief of the defendant, and their being no genuine issue as to any material fact involved in this case, and the Court being fully advised in the premises, and, under date of August 19, 1948, this Court having issued and filed its memorandum opinion and decision herein:

It Is, Therefore, Adjudged, Ordered And Decreed that the plaintiff's motion for summary judgment for a mandatory injunction commanding the defendant to file the report requested by the Commission's order of September 2, 1947, more fully described in said memorandum opinion and decision, and for judgment against the defendant in the amount of $100 a day for each day from and after April 1, 1948, be and the same hereby is denied; and

91 Be It Further Ordered, Adjudged And Decreed that the defendant's motion for summary judgment that defendant is not liable for the $100 a day penalty be and the same hereby is allowed, and judgment is hereby entered for the defendant and against the plaintiff with respect thereto; and that defendant's motion for summary judgment that it is not liable to file the report requested by the said Commission's order of September 2, 1947, be and the same hereby is allowed, and with respect thereto the complaint herein is dismissed for lack of jurisdiction of this Court.

Enter:

Philip L. Sullivan,

Date: August 20, 1948. *Judge.*

92 And afterwards on, to wit, the 15th day of October, 1948, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice Of Appeal in words and figures following, to wit:

93 IN THE UNITED STATES DISTRICT COURT,

For the Northern District of Illinois,

Eastern Division.

United States of America,
*Plaintiff.*
*vs.*
Morton Salt Company,
*Defendant.*
No. 48-C-698.

NOTICE OF APPEAL.

The United States of America, plaintiff-appellant, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the judgment and order of the United States District Court for the Northern District of Illinois, Eastern Division, entered on August 20, 1948, dismissing plaintiff-appellant's complaint.

Otto Kerner, Jr.,
*United States Attorney.*

October , 1948.

(Attached Hereto Is The Following Certificate):

94 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

## CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, keeper of the Seal and Records of said Court, do hereby certify that on the 18th day of October, 1948, in accordance with Rule 73 (b) of the Rules of Civil Procedure for District Courts of the United States, I mailed a copy of the foregoing Notice of Appeal to the following attorneys of record:

Asheraft and Asheraft,
Charles H. G. Kimball,
134 S. La Salle Street,
Chicago, Illinois;

McBride and McBride,
L. M. McBride, E. H. Baker, Jr.,
Harvey Wienke and James T. Welch,
120 South La Salle Street,
Chicago, Illinois.

Roy H. Johnson,
*Clerk.*

(Seal)

95 And on the same day, to wit, the 3rd day of November, 1948, came the Plaintiff-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Statement Of Points On Appeal in words and figures following, to wit:

96 In the District Court of the United States.

* * (Caption—48-C-698) * *

## PLAINTIFF-APPELLANT'S STATEMENT OF POINTS ON APPEAL.

Comes now the United States of America, plaintiff-appellant in the above-entitled cause, and says that it relies upon the following points in the prosecution of its appeal from the final judgment and order of the United States District Court for the Northern District of Illinois, Eastern Division, entered on August 20, 1948.

1. The District Court erred in holding that this action was instituted for the purpose of enforcing compliance with a modified order to cease and desist issued by the Federal Trade Commission.

2. The District Court erred in holding that this action was instituted for the purpose of enforcing compliance with a decree of the Court of Appeals for the Seventh Circuit.

3. The District Court erred in holding that the order of the Federal Trade Commission dated September 2, 1947, did not initiate an investigation authorized by subsections (a) and (b) of Section 6 of the Federal Trade Commission Act and by Rule XXVI of the Rules of Practice of the Federal Trade Commission.

97 4. The District Court erred in holding that the supplemental compliance report sought by the Federal Trade Commission through its order dated September 2, 1947, is not the kind of report set out in subsection (a) or subsection (b) of Section 6 of the Federal Trade Commission Act.

5. The District Court erred in holding that the Federal Trade Commission had no authority to investigate compliance with an order to cease and desist issued by the

Federal Trade Commission by issuing a special order requiring the defendant to file a special report.

6. The District Court erred in holding that Section 6 of the Federal Trade Commission Act is only to be invoked in support of general economic surveys.

7. The District Court erred in holding that subsection (b) of Section 6 may not be invoked by the Federal Trade Commission in connection with investigations of compliance with orders to cease and desist issued by the Federal Trade Commission against corporations under Section 5 of the Federal Trade Commission Act.

8. The District Court erred in failing to hold that the Federal Trade Commission has the inherent power under Section 5 of the Federal Trade Commission Act to require reports of compliance with orders to cease and desist issued under that section.

9. The District Court erred in holding that the Federal Trade Commission had no authority to promulgate Rule XXVI of its Rules of Practice for the purpose of carrying out the provisions of Section 5 of the Federal Trade Commission Act.

98 10. The District Court erred in stating that it was the position of the Federal Trade Commission "that Rule XXVI has nothing to do with Section 5 compliance reports, but is only in aid of economic survey reports under Section 6 (b)."

11. The District Court erred in holding that subsection (g) of Section 6 of the Federal Trade Commission Act authorizes the Federal Trade Commission to promulgate rules only for the purpose of carrying out the provisions of Section 6, and does not authorize the Federal Trade Commission to promulgate rules for the purpose of carrying out the provisions of Section 5 and the remaining sections of the said Act.

12. The District Court erred in failing to hold that the Federal Trade Commission has the inherent power to promulgate rules of practice for the purpose of carrying out the provisions of all of the sections of the Federal Trade Commission Act.

13. The District Court erred in holding that Sections 5 and 6 of the Federal Trade Commission Act must be considered separately and that the powers conferred by Sec-

tion 6 are wholly unrelated to the powers conferred by Section 5.

14. The District Court erred in holding that the only methods of investigating compliance with orders to cease and desist issued by the Federal Trade Commission are by issuing new complaints, by initiating civil penalty proceedings under subsection (1) of Section 5 of the Federal Trade Commission Act, and by initiating contempt proceedings in a court of appeals for violation of decrees affirming and enforcing the said orders to cease and desist.

99 15. The District Court erred in taking into consideration the legislative history of an Act of Congress where the language of the statute is clear and unambiguous and permits only one interpretation.

16. The District Court erred in holding that the legislative history of subsection (b) of Section 6 of the Federal Trade Commission Act indicates that Congress intended that the subsection be invoked only in connection with general economic surveys being conducted by the Federal Trade Commission.

17. The District Court erred in holding that the forfeiture provision of Section 10 of the Federal Trade Commission Act applies only to a failure of corporations to file reports required by the Federal Trade Commission in general economic surveys.

18. The District Court erred in holding that the forfeiture provision of Section 10 of the Federal Trade Commission Act was not applicable to a failure to comply with an order requiring information as to the manner in which an order to cease and desist is being observed.

19. The District Court erred in holding that the forfeiture provision of Section 10 of the Federal Trade Commission Act was not applicable to a failure to attach copies of price lists, freight rate books and terms and conditions of sale to a special report required by the Federal Trade Commission.

20. The District Court erred in holding that it had no jurisdiction to entertain the suit.

21. The District Court erred in entering the final judgment herein.

100 22. The District Court erred in denying plaintiff's motion for summary.

23. The District Court erred in allowing defendant's motion for summary judgment.

Wherefore, the plaintiff-appellant, the United States of America, prays that the said final judgment in this cause may be reversed, and for such other and further relief as may be just in the premises.

Otto Kerner, Jr.,
*United States Attorney,*
Chicago, Illinois.

John P. Lulinski,
*Assistant United States Attorney,*
Chicago, Illinois.

J. Stephen Doyle, Jr.,
*Special Assistant to the Attorney General,*
United States Department of Justice,
Washington, D. C.

Joseph S. Wright,
*Assistant General Counsel,*
Federal Trade Commission,
Washington, D. C.

J. B. Truly,
*Special Attorney,*
Federal Trade Commission,
Washington, D. C.

101 And afterwards on, to wit, the 3rd day of November, 1948 came the Plaintiff-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Designation of Record on Appeal in words and figures following, to wit:

102 In the District Court of the United States.

* * (Caption—48 C 698) * *

## DESIGNATION OF RECORD ON APPEAL

United States of America, plaintiff-appellant, designates the entire record for transmittal on appeal.

Otto Kerner, Jr.,
*United States Attorney.*

November 3, 1948.

103 Northern District of Illinois, } ss:
Eastern Division. }

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation of Record on Appeal filed in this Court in the cause entitled: United States of America, Plaintiff, *vs.* Morton Salt Company, Defendant, No. 48 C. 698, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 10th day of November, 1948.

Roy H. Johnson,
*Clerk.*

By Gizella Butcher,
*Deputy Clerk.*

(Seal)

# UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of the record, filed in this Court on December 30, 1948, in

Cause No. 9753

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

*vs.*

MORTON SALT COMPANY, DEFENDANT-APPELLEE

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifteenth day of July, A. D. 1949.

[SEAL] (S.) KENNETH J. CARRICK,
*Clerk of the United States Court of Appeals for the Seventh Circuit*

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the fifth day of October, in the year of our Lord, one thousand, nine hundred and forty-eight, and of our Independence the one hundred-seventy-third.

No. 9753

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

*vs.*

MORTON SALT COMPANY, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

And afterward, to-wit, on the eleventh day of March, 1949, the following further proceedings were had and entered of record, to-wit:

# UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

March 11, 1949

Before: Hon. J. Earl Major, Chief Judge

No. 9753

United States of America, plaintiff-appellant,

*vs.*

Morton Salt Company, defendant-appellee

No. 9754

United States of America, plaintiff-appellant,

*vs.*

International Salt Company, defendant-appellee

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

Pursuant to stipulations of counsel, it is ordered:

(1) That the above entitled appeals be consolidated for the purposes of oral argument;

(2) That the plaintiff-appellant be allowed one hour and fifteen minutes for oral argument and the two defendants-appellees be allowed an aggregate of one hour and fifteen minutes for oral argument, with the latter time to be divided between the defendants-appellees as they see fit; and

(3) That the oral argument for the consolidated hearing in these cases be set for Tuesday, April 12, 1949, at 9:30 A. M.

And afterward, to-wit, on the twentieth day of May, 1949, there was filed in the office of the Clerk of this Court the opinion of the Court, which said opinion is in the words and figures following, to-wit:

# IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OCTOBER TERM, 1948, APRIL SESSION, 1949

Nos. 9753-9754

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

*vs.*

MORTON SALT COMPANY, DEFENDANT-APPELLEE

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

*vs.*

INTERNATIONAL SALT COMPANY, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

May 20, 1949

Before MAJOR, *Chief Judge*, MINTON and DUFFY, *Circuit Judges*

MAJOR, *Chief Judge:*

This action was commenced by the United States against numerous defendants, including International Salt Company and Morton Salt Company. From an adverse judgment entered August 20, 1948, the government separately appealed as to these two defendants. Only issues of law are involved in each appeal, and, being identical, they may appropriately be considered and disposed of in a single opinion.

The action, according to the complaint, was instituted by the Attorney General upon request of the Federal Trade Commission (hereinafter called the Commission) for the enforcement of a Commission order "requiring additional reports of compliance," and to recover forfeitures for failure of defendants to comply with such order. The action is predicated upon Title 15 U.S.C.A. Sec. 49,[1] which vests the several District Courts of the United States with jurisdiction to direct a corporation to comply with an order issued by the Commission, and Sec. 50, which vests any District Court with jurisdiction of suits by the United States for the recovery of for-

[1]Section numbers used in this opinion, unless otherwise noted, refer to the Federal Trade Commission Act, Title 15 U.S.C.A.

feitures if a corporation fails to file any report so required within the time fixed by the Commission.

The order sought to be enforced was issued by the Commission on September 2, 1947, under the authority asserted to reside in Rule XXVI, promulgated by the Commission, and Sec. 46 (a) and (b) of the Act. The complaint sets forth verbatim the order relied upon and the notice of default served on the defendants. There are attached to the complaint numerous exhibits, including a copy of Rule XXVI.

The court below in a well reasoned opinion held that it was without jurisdiction to entertain the cause of action. United States v. Morton Salt Co. and International Salt Co. v. United States, 80 F. Sup. 419. This holding was predicated upon the conclusion that the Commission's order of September 2, 1947, was invalid because issued without authority. It is obvious, so we think, that the right to maintain the instant action is dependent upon the validity of the order.

The issue thus presented calls for a further statement of the factual situation. On September 18, 1940, the Commission issued its complaint under Sec. 45, charging defendants and others with engaging in an unlawful conspiracy to fix prices on and to control the production of salt in connection with the sale and distribution of that commodity in interstate commerce. On November 10, 1941, the Commission issued its order to cease and desist, requiring the defendants to discontinue the conspiracy alleged in the complaint. A petition for review of the Commission's order was filed by the defendants in this court which rendered its opinion March 8, 1943. Salt Producers Association v. Federal Trade Commission, 134 F. 2d 354. On April 20, 1943, this court entered its decree modifying the Commission's order in certain respects, affirming it as modified and directing compliance therewith. In effect, this court by its decree enforced the modified cease and desist order under Sec. 45 and commanded these defendants (as well as the others) to obey said decree, without prejudice to the right of the Commission to initiate contempt proceedings or penalty proceedings under Sec. 45 (l), and it required the defendants to file a compliance report within ninety days and reserved to this court "jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof * * *." Within the time thus designated in the decree of this court, each of the defendants filed a report with the Commission showing the manner and form in which they were complying with the court's decree. In the interim, during a period of more than five years, no question has been raised by the Commission as to the form or content of such compliance reports, and during said period the defendants have not been charged with a violation of the decree of this court and no

request has been made by the Commission that this court order or direct an investigation into defendants' conduct.

The government apparently senses the insecurity of its position if it be held that the order sought to be enforced was in aid of or for the purpose of enforcement either of the decree of this court or the Commission's cease and desist order modified to conform therewith. And so any such purpose on the part of the Commission is disclaimed. There was no attempt, so it is asserted, to enforce either the court's decree or the Commission's order, but "the sole purpose of the order requiring the reports was to inquire as to the manner of compliance by defendants with the Commission's modified order to cease and desist * * and this Court's decree enforcing that order." We have some difficulty in following a theory that the purpose was merely to obtain information as to whether defendants have been violating the decree of this court and at the same time denying that such purpose bears any relation to its enforcement. We are informed that if the defendants are shown to have violated the order of the Commission modified in conformity with the decree of this court, two courses are open, (1) it can certify the facts to the Attorney General under Sec. 56 of the Act, requesting that he file a civil suit seeking civil penalties under the provisions of Sec. 45 (l), or (2) it can petition this court for a rule requiring defendants to show cause why they are not in contempt of court.

We, as the court below, do not agree with the government's contention that the Commission initiated a new investigation. The record plainly discloses that the controverted order was issued in connection with and as a part of the proceeding theretofore had under Sec. 45; in fact, the order itself calls for "an additional and supplemental report showing the manner and form of compliance with the modified order to cease and desist entered by the Commission on August 10, 1943, and with the decree of the Circuit Court of Appeals for the 7th Circuit entered on April 22, 1943." "Additional and supplemental" to what? The answer must be that such reference was to the report of compliance required by the decree of this court and that the order was only a further step in the proceeding of which this court retained jurisdiction. Any doubt in this respect is dispelled by the fact that the order of September 2, 1947, is given the same title and docket number as the Commission's original order dated November 10, 1941.

As already noted, this court retained jurisdiction "to enter such further orders * * as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof." The jurisdictional reservation thus provided was in conformity with Sec. 45 of the Act; in fact, a reading of this section discloses in unmistakable fashion that every vestige of jurisdiction over a proceeding such as that under discussion was definitely

lodged with the Court of Appeals. The court is given the power to enter a decree "affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed," and "the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." It is also provided, "The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari." Not only was the court endowed with jurisdictional power, but by subsection (d) it was provided that such jurisdiction "shall be exclusive."

Thus, with enforcement jurisdiction so firmly and exclusively lodged in a Court of Appeals both by the statute and decree of the court, it would seem that one who asserts such jurisdiction to reside elsewhere is confronted with a heavy burden which can be met only by a rule or statutory provision, which makes clear a legislative purpose to impair or divide the jurisdictional responsibility provided in Sec. 45. Language which only confuses the situation or raises a doubt should not be accepted as sufficient.

An analysis of Sec. 46 furnishes no sound basis for the contention either that it can be utilized as an aid to a proceeding under Sec. 45 or that it was intended to impair or detract from the unambiguous and exclusive jurisdictional provision of that section.

Sec. 46, so far as relevant, empowers the Commission in paragraph (a) "To gather and compile information concerning, and to investigate * * the organization, business, conduct, practices, and management of any corporation * * and its relation to other corporations and to individuals, associations and partnerships," and in paragraph (b) "To require, by general or special orders, corporations, * * or any class of them, or any of them * * to file with the commission * * annual or special, or both annual and special, reports or answers in writing to specific questions * *," which will inform the Commission regarding the business affairs of those corporations, and the "relation" thereof "to other corporations, partnerships, and individuals * *."

Not only does the language fail to to reveal any interdependence of the two sections, but the opposite is indicated. Sec. 46 is directed solely to a "corporation," while Sec. 45 refers to any "person, partnership or corporation." Also, Sec. 46 is concerned with "annual or special, or both annual and special, reports," while Sec. 45 makes no mention of reports but leaves it to the court to "issue its own order commanding obedience to the terms of such order of the Commission."

Both sides have set forth, particularly with reference to Secs. 45 and 46, a large amount of legislative history, a discussion of which would serve no useful purpose. It can be safely said, however, that such history discloses that Secs. 45 and 46 were not intended as com-

plementary but were designed as separate and distinct, each directed to different situations. The dual purposes embodied in the two sections were recognized in F.T.C. v. Millers' National Federation, 47 F. 2d 428, 429, wherein the court stated: "The power of investigation conferred upon the Commission by section 6 is different in character from the jurisdiction conferred by section 5. Section 6 contemplates an investigation for the collection of facts for the information of Congress in aid of the exercise of its legislative function, or for the President in aid of recommending necessary legislation." See also F.T.C., et al. v. Claire Furnace Co., et al., 274 U. S. 160, 170.

The report required by the controverted order, as already noted, calls for "an additional or supplemental report showing the manner and form of compliance," while Sec. 46 is limited to "annual or special reports." In order to bridge this gap we are urged to hold that there is no difference between "an additional or supplemental report" and a "special report." We are not impressed with this reasoning. It seems reasonably plain to us that the term "special report," as used in Sec. 46, means something entirely different and distinct from "an additional or supplemental report showing the manner and form of compliance." This view is strengthened from the fact that Sec. 50, upon which the instant forfeiture action is predicated, provides for recovery for failure to file "any annual or special report * * within the time fixed by the Commission." It is of significance that this forfeiture section and Sec. 46 characterize the report precisely in the same manner. No forfeiture is provided for failure to file "an additional or supplemental report," as called for by the Commission's order in the instant matter. In fact, reports so designated are not, so far as we are aware, referred to any place in the Act.

Admittedly, the report required by the Commission's order in the instant matter is not an "annual report," and we think it equally plain that it is not a "special report." This view finds support in the House Committee's report on interstate and foreign commerce (Report No. 533, 63rd Congress, 2nd Session), wherein annual and special reports are discussed. The congressional committee stated the purpose in authorizing the Commission to require special reports as follows: "The Commission under this section may also require such special reports as it may deem advisable. By this means, if the ordinary data furnished by a corporation in its annual report does not adequately disclose its organization, financial condition, business practices, or relation to other corporations, there can be obtained by special report such additional information as the Commission may deem necessary." It thus appears that the purpose of the "special report" was to enable the Commission to obtain information which had not been furnished in the "annual report." In other words, the "special report" was intended as additional or

supplemental to the "annual report" but not as additional or supplemental to an order of compliance under Sec. 45.

Irrespective, however, of Sec. 46, the Commission argues that its order is authorized by Rule XXVI. The substance of this rule is contained in two unnumbered paragraphs. The first paragraph requires that a report of compliance be made to the Commission within sixty days (1) after a cease and desist order has been issued by the Commission, or (2) where the parties stipulate to cease and desist. This paragraph contains a proviso as follows: "* * provided, however, that if within the said sixty (60) day period respondent shall file petition for review in a circuit court of appeals, the time for filing report of compliance will begin to run de novo from the final judicial determination * *." We do not understand the government to contend that this paragraph is of any aid to its contention in the instant situation. Obviously, it is not because reports of compliance were made by the defendants within the time fixed by the court. It is interesting to note, however, that this court in its decree fixed ninety days within which the defendants were required to comply rather than the sixty days provided in the rule. It would seem either that the rule was not called to the court's attention or that it was ignored. And we have no doubt that the sixty-day limitation contained in this proviso was not binding upon the court, which had the authority to fix such time for compliance as it saw fit.

The Commission relies upon the second paragraph of the rule, which provides:

> "Within its sound discretion, the Commission may require any respondent upon whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order or with said stipulation."

The scope of this rule appears to depend upon what is meant by "such order * * and any party entering into such stipulation." Does it refer only to an order entered by the Commission and a party entering into a stipulation as provided for in the first paragraph of the rule, or does it include a court decree or an order of the Commission merged therein, as the plaintiff here contends?

The Commission, in support of its authority, relies upon Sec. 46 (g), which provides:

> "From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act."

Thus, two powers are conferred upon the Commission, (1) to classify corporations and (2) to make rules and regulations, and such

powers are joined by the conjunction "and," which would indicate that the latter power is related to the former. As already noted, it is only Sec. 46 which is limited to corporations, while Sec. 45 includes any "person, partnership, or corporation." If the plaintiff's contention be accepted that the Commission is authorized by this provision to promulgate a rule directed to the enforcement of Sec. 45, then the exclusive jurisdiction which that section confers upon courts becomes little more than an empty gesture. We need not labor this point, however, because what we have said concerning Sec. 46 as it relates to Sec. 45 is also pertinent to Rule XXVI. In our view, the authority contained in Sec. 46 (g) must be limited to Sec. 46. Use of language which indicates a broader scope is not difficult to understand because at the time of the insertion of Sec. 46 (g) there was no Sec. 45, and when the latter section was added there was a failure to remove or modify Sec. 46 (g). If the latter section be given the scope urged by the plaintiff, the Commission would have the authority by rule to impair or share the "exclusive jurisdiction" which is expressly conferred upon the courts by Sec. 45.

And it appears that the plaintiff in the lower court placed no such reliance upon this rule as it does here. At any rate, that court (80 F. Sup. 419, 425) stated: "The Commission also insists that Rule XXVI has nothing to do with Section 5 compliance reports, but is only in aid of economic survey reports under Section 6 (b)." The plaintiff here insists that its position was misinterpreted and quotes from its brief in that court. We note, however, the following statement from its quotation: "This rule was promulgated under subsection (g) of Sec. 6 and implements the authority granted the Commission by subsection (b) thereof." In our view, that was the purpose of the rule and the extent of its intendment. We are of the view that it furnishes no support for the controverted order before us.

Plaintiff also argues that the Commission has the inherent power to require reports of compliance with its orders to cease and desist. We need not explore the validity of this argument as it is beside the point. We are not here concerned with the power of the Commission, inherent or otherwise, to enforce its own orders, but with its power to enforce or aid in enforcement of a decree of this court or an order of the Commission which has become merged in a decree of this court. This we think it had on its own initiative no power or authority to do.

The judgment appealed from is affirmed.

MISTON, *Circuit Judge*, dissenting.

A cease and desist order of the Federal Trade Commission that has become final without review or after review by this Court and is not complied with, may result in judgment by a District Court for a civil penalty under 15 U.S.C. Sec. 45(1) or enforcement pro-

ceedings before the reviewing Court of Appeals, 15 U.S.C. Sec. 45 (d). Noncompliance may result in dual action—one, for a penalty before the District Court; two, for enforcement by contempt proceedings by the Court of Appeals; or a choice between the two remedies. Punishment for past delinquencies would seem to lie with the District Court. Enforcement looking to the future would seem to lie with the Court of Appeals. Whether to proceed for punishment or enforcement, or both, would require someone to produce the facts. This is the Commission's job. As I understand the instant proceeding, it is not an attempt at enforcement of this Court's decree by the proceeding here instituted in the District Court, and is therefore by no stretch of imagination an interference with the exclusive jurisdiction of this Court to enforce its orders. The instant proceeding is an attempt by the Commission to get the facts upon which to base a judgment as to whether there has been compliance, which, if present, results in no further proceedings; or noncompliance, which, if present, may lead to action for penalty or enforcement, or possibly both.

Does the Act authorize the Commission to use the procedure it has adopted here to get the facts? We must assume that the Commission is unable to tell from the data furnished whether there has been compliance. Public officers are presumed to act in good faith until the contrary has been made to appear. The Commission finds the authority for the present procedure to obtain the facts under 15 U.S.C. Sec. 46 (a) and (b) and under Rule 26 [1] promulgated by the Commission. It is the position of the Commission that either the rule or the statute is sufficient to justify its action.

It seems to me that when Congress enacted the Federal Trade Commission Act, it was providing an integrated act and not a compartmentalized act, as the majority of this Court seems to think. In my view of the case, it is unnecessary to deal with Sec. 46 (a) and (b) and the narrow, restricted construction thereof, as indulged in by the majority of this Court. I find ample support for the procedure of the Commission contained in its rules, read in conjunction with the provisions of the statute. Sec. 46 (g) of the statute provides:

> "Sec. 46. Additional powers of Commission.
>
> "The commission shall also have power—
>
> • • •
>
> "(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of sections 41-46 and 47-58 of this title."

[1] 12 Fed. Reg. 5448, August 12, 1947.

This, it will be noted, is a part of Sec. 46 which the majority of this Court holds applies only to corporations. The section just quoted specifically refers to Secs. 41-46. Sec. 45, which is within this reference, deals with persons, partnerships, and corporations, and the cease and desist order here involved arose out of a Sec. 45 proceeding. It seems clear to me that Congress by Sec. 46 (g) gave a broad power to make rules for the carrying out of the provisions of the whole Act. Under this power, the Commission promulgated Rule 26, the pertinent provisions of which read as follows:

> "In every case where an order to cease and desist is issued by the Commission for the purpose of preventing violations of law and in every instance where the Commission approves and accepts a stipulation in which a party agrees to cease and desist from the unlawful methods, acts or practices involved, the respondents named in such orders and the parties so stipulating shall file with the Commission, within sixty days of the service of such order and within sixty days of the approval of such stipulation, a report, in writing, setting forth in detail the manner and form in which they have complied with said order or with said stipulation; *provided, however,* that if within the said sixty (60) day period respondent shall file petition for review in a circuit court of appeals, the time for filing report of compliance will begin to run de novo from the final judicial determination;
>
> • • •
>
> "Within its sound discretion, the Commission may require any respondent upon whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order or with said stipulation."

We are dealing here with a cease and desist order that has been reviewed by this Court. The rules of the Commission provide that in such a case, the time for filing a report of compliance *begins to run* from the final judicial determination. Nothing is said as to *how long after the time commences to run* the report of compliance shall be filed with the Commission. Apparently the reviewing court's order fixed that time and in the instant case, this Court fixed it at ninety days. Obviously, this rule in no manner interferes with the jurisdiction of this Court to make or enforce its order. Under this rule, whose validity is not challenged here, and which rule has the effect of law, the Commission may require a party to such cease and desist order "to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order."

What the Commission did on September 2, 1947, in the instant case was to require the defendants to file within thirty days after the service of notice additional reports showing in detail the manner and form in which the defendants had been and were complying with the cease and desist order and the decree of this Court, together with some supporting data. On September 22, 1947, the Commission, at the request of one of the respondents in the cease and desist order but not one of the defendants here, extended the time for filing the additional reports and data to November 1, 1947. The other eighteen respondents in the order complied. Apparently the Commission's procedure did not impress them as unusual. The defendants refused to comply and, being in default for more than thirty days after November 1, 1947, the Commission on February 27, 1948, served notice of default upon the defendants, and, upon their further failure to comply within thirty days, instituted the instant proceeding, pursuant to 15 U.S.C. Sec. 50, which provides:

> "If any corporation required by said sections to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day * * *."

This Sec. 50 refers to "special reports" required by "*said sections*," that is, Secs. 41-46 and 47-58 which are the essential provisions of the Act. True, the Commission's proceedings refer not to "special reports" but to "additional," "further" and "supplemental" reports. It seems to me to say the latter are not special reports is to indulge in a refinement in language that would not be countenanced even in a criminal proceeding. I think "additional," "further" and "supplemental" are the equivalent of "special," since they are all reports not required in the usual course.

The majority have stressed what it sees as an interference with this Court's jurisdiction to enforce its decree. This is a bit unsubstantial, it seems to me. If the facts obtained justify proceedings, the Commission might proceed only for the penalty under Sec. 45 (l). In that instance, the Commission would not have to consult this Court at all. If it sought enforcement it could only be in this Court in full recognition of its jurisdiction.

What this case adds up to is this: That the defendants have refused deliberately, and with full consciousness of the consequences, to comply with an order of the Commission made pursuant to lawful authority, and such deliberate refusal comes squarely within the punitive provisions of Sec. 50. The Commission's rules have been

published in the Code[2] as a part thereof, following 15 U.S.C. Sec. 45 (1946 Edition). Since the regulations, which are authorized by the statute, together with the statute authorized the procedure which the Commission has followed, the defendants have certainly not been misled. I would reverse the judgment of the District Court.

A TRUE COPY:

TESTE:

*Clerk of the United States Court of Appeals for the Seventh Circuit.*

And on the same day, to-wit, on the twentieth day of May, 1949, the following further proceedings were had and entered of record, to-wit:

United States Court of Appeals for the Seventh Circuit

May 20, 1949

Before

HON. J. EARL MAJOR, *Chief Judge*,
HON. SHERMAN MINTON, *Circuit Judge*,
HON. F. RYAN DUFFY, *Circuit Judge*.

No. 9753

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

*vs.*

MORTON SALT COMPANY, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

This case came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

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[2] The present rule is Rule 25 in the Code, the same number as in prior publications of the rule in 11 Fed. Reg. 7074-7075, June 26, 1946; 10 Fed. Reg. 7388, June 20, 1945.

United States Court of Appeals for the Seventh Circuit

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of the order of this Court consolidating the causes, the opinion of the Court and the Judgment of the Court in Cause No. 9753, United States of America, Plaintiff-Appellant, vs. Morton Salt Company, Defendant-Appellee, as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifteenth day of July, A. D. 1949.

[SEAL] (S.) KENNETH J. CARRICK,

*Clerk of the United States Court of Appeals for the Seventh Circuit.*

☆ U. S. GOVERNMENT PRINTING OFFICE 1950 [illegible]

Supreme Court of the United States

*Order allowing certiorari*

Filed October 24, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is gra.....

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas and Mr. Justice Minton took no part in the consideration or decision of this application.

In the

# United States Court of Appeals

## For the Seventh Circuit

No. 9754

THE UNITED STATES OF AMERICA,
*Plaintiff-Appellant,*

*vs.*

INTERNATIONAL SALT COMPANY,
*Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

J-29799 The Gunthorp-Warren Printing Co., Chicago—12-20-48—65

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I Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of July (it being the 5th day thereof) in the year of our Lord One Thousand Nine Hundred and Forty-Eight and of the Independence of the United States of America, the 173rd year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Friday, August 20, 1948.

Court met pursuant to adjournment.

Present: Honorable Philip L. Sullivan, Trial Judge.

2 IN THE UNITED STATES DISTRICT COURT,

For the Northern District of Illinois,

Eastern Division.

United States of America,
*Plaintiff,*
*vs.*
International Salt Company,
*Defendant.*
} No. 48-C-699.

Be It Remembered, that, on to-wit, the 18th day of May, 1948, the above-entitled action was commenced by the filing of the following Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

3 IN THE UNITED STATES DISTRICT COURT
* * (Caption—48-C-699) * *

## COMPLAINT.

Plaintiff, by Otto Kerner, Jr., United States Attorney in and for the Northern District of Illinois, acting under the direction of the Attorney General, upon request of the Federal Trade Commission, brings this action for the enforcement of an order of the Federal Trade Commission which required defendant to file a special report and for the recovery of forfeitures because of the failure of the defendant to comply with the said order.

1. The action arises under Title 15, U. S. C. A., Section 49, being Section 9 of the Act of September 26, 1914 (38 Stat. 717), as amended March 21, 1938 (52 Stat. 111) (the said Act as amended being hereinafter referred to as the "Act"), vesting the several district courts of the United States with specific jurisdiction to enter orders commanding a corporation to comply with any order issued by the Federal Trade Commission pursuant to the said Act,
4 and under Title 15, U. S. C. A., Section 50, being Section 10 of the said Act, vesting any district court

of the United States in which a corporation has its principal office or in which it does business with specific jurisdiction of suits by the United States for the recovery of forfeitures if the corporation shall fail to file any special report required by the said Act within the time fixed by the Federal Trade Commission for filing the same, as hereinafter more fully appears.

2. The defendant, International Salt Company, is a corporation organized and existing under the laws of the State of New Jersey. The defendant transacts a substantial part of its business in the Northern District of the State of Illinois.

3. During all the times herein mentioned defendant was engaged in the business of producing various types and grades of salt, and of selling and distributing such salt in interstate commerce, as "commerce" is defined in Title 15, U. S. C. A., Section 44, being Section 4 of the said Act.

4. The Federal Trade Commission, on September 2, 1947, issued an order pursuant to the provisions of Rule XXVI of its published Rules of Practice (12 Fed. Reg. 5444, 5448), promulgated under and in accordance with the provisions of Title 15, U. S. C. A., Section 46(g), being subsection (g) of Section 6 of the said Act, and pursuant to the provisions of Title 15, U. S. C. A.,
5 Section 46(a) and 46(b), being subsections (a) and (b) of Section 6 of the said Act, requiring the defendant to file a report with the Federal Trade Commission within 30 days after the date of service of the order. A true and complete copy of the said Rule XXVI is attached hereto marked "Exhibit A" and made a part hereof. The said order dated September 2, 1947, requiring the defendant to file the report is set forth in full below:

## UNITED STATES OF AMERICA

### BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 2nd day of September, A. D. 1947.

Commissioners:

Garland S. Ferguson, Chairman,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer,
Lowell B. Mason.

In the Matter of
Salt Producers Association, *et al.* } Docket No. 4320.

## ORDER REQUIRING ADDITIONAL REPORTS OF COMPLIANCE FROM CERTAIN RESPONDENTS.

This matter coming on to be considered on the Commission's own motion and upon further consideration of the reports of compliance with the order to cease and desist heretofore received and filed on behalf of the respondents under dates of August 2 and August 3, 1943, and the Commission being of the opinion that the public interest requires that there be filed on behalf of the respondents named below, an additional and supplemental report showing the manner and form of compliance with the modified order to cease and desist entered by the Commission on August 10, 1943, and with the decree of the Circuit Court of Appeals for the 7th Circuit entered
6 on April 22, 1943, and pursuant to Rule XXVI of its published Rules of Practice, and the authority granted in subsections (a) and (b) of Section 6 of the Federal Trade Commission Act (38 Stat. 721; 15 U. S. C. A. Sec. 46),

Now, Therefore, Be It Ordered that respondents Salt Producers Association; Avery Salt Company; Barton Salt Company; Carey Salt Company; Cayuga Rock Salt Company; Colonial Salt Company; Detroit Rock Salt Company; Diamond Crystal Salt Co., Inc.; International

Salt Company; Jefferson Island Salt Company, Inc.; Hardy Salt Company; Morton Salt Company; Myles Salt Company, Ltd.; Mulkey Salt Company; Ohio Salt Company; Ruggles & Rademaker Salt Company; Saginaw Salt Products Company; Union Salt Company; Watkins Salt Company; and American Salt Corporation, within thirty (30) days after service upon them of this order, shall file additional reports showing in detail the manner and form in which they have been, and are now, complying with said modified order to cease and desist and said decree of the United States Circuit Court of Appeals for the 7th Circuit;

It Is Further Ordered that there shall be submitted, as a part of such supplemental reports of compliance, a complete statement on the part of each of the producer respondents named above, of the prices, terms and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements distributed, published or employed in marketing salt from and after January 1, 1944;

It Is Further Ordered that there shall be submitted as a part of such supplemental report of compliance on the part of respondent Salt Producers Association a statement of the present organization and objectives of said respondent association, together with a detailed description of all activities and services supplied to or conducted by said respondent association for or on behalf of its members from January 1, 1944, to date.

By the Commission.

Otis B. Johnson,
*Secretary.*

7 5. The order dated September 2, 1947, was served on the defendant by registered mail on September 4, 1947. A true and complete copy of the return receipt signed by the defendant showing service of the said order is attached hereto marked "Exhibit B" and made a part hereof.

6. The Federal Trade Commission, on September 22, 1947, issued its order extending until November 1, 1947, the time for filing the report required by its order dated September 2, 1947. A true and complete copy of the said order dated September 22, 1947, is attached hereto marked "Exhibit C" and made a part hereof.

7. The order dated September 22, 1947, was served on the defendant by registered mail on September 23, 1947. A true and complete copy of the return receipt signed by the defendant showing service of the said order is attached hereto marked "Exhibit D" and made a part hereof.

8. The Federal Trade Commission, on February 27, 1948, pursuant to Title 15, U. S. C. A., Section 50, being Section 10 of the said Act, issued its notice of default to defendant because of defendant's failure to file the report required by the order dated September 2, 1947. The notice of default is set forth in full below:

## UNITED STATES OF AMERICA

### BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 27th day of February, A. D. 1948.

8 Commissioners:

Robert E. Freer, Chairman,
Garland S. Ferguson,
Ewin L. Davis,
William A. Ayres,
Lowell B. Mason.

In the Matter of
Salt Producers Association, *et al.* } Docket No. 4320.

## NOTICE OF DEFAULT TO INTERNATIONAL SALT COMPANY.

Whereas the Federal Trade Commission on September 2, 1947, pursuant to Rule XXVI of its published Rules of Practice and to the authority granted in subsections (a) and (b) of Section 6 of the Federal Trade Commission Act (38 Stat. 721), issued its order requiring International Salt Company, a corporation, to file an additional and supplemental report within thirty days after service upon it of the said order showing in detail the manner and form in which it has been, and is now, complying with the modified order to cease and desist issued by the Commission on August 10, 1943, and further requiring Inter-

national Salt Company to submit as a part of its supplemental report of compliance "a complete statement • • • of the prices, terms and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements distributed, published or employed in marketing salt from and after January 1, 1944"; and

Whereas the said order of the Commission dated September 2, 1947, was duly served upon International Salt Company by registered mail on September 4, 1947; and

Whereas the Commission, on September 22, 1947, issued its order extending the time for filing the said supplemental report of compliance until November 1, 1947; and

Whereas International Salt Company has failed to file the supplemental report of compliance containing the information required by the Commission's said order dated September 2, 1947, on or before November 1, 1947, or at any time thereafter prior to the date of this resolution, and no additional time having been requested by International Salt Company or granted by the Commission for the filing of the said report; and

Whereas Section 10 of the Federal Trade Commission Act (38 Stat. 723) provides in part as follows:

"If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business."

Now, Therefore, You, International Salt Company, Are Hereby Notified, as provided for in Section 10 of the Federal Trade Commission Act (38 Stat. 723), that you are in default in having failed to file the report containing the information required by the Commission's order dated September 2, 1947, on or before November 1, 1947, or at any time thereafter.

By the Commission.

Otis B. Johnson,
*Secretary.*

9. The said notice of default dated February 27, 1948, was served on the defendant by registered mail on March 1, 1948. A true and complete copy of the return receipt signed by the defendant showing service of the notice of default is attached hereto marked "Exhibit E" and made a part hereof.

10. The failure of the defendant to file the report required by the order of the Federal Trade Commission dated September 2, 1947, has continued for 30 days after notice of such default and is still continuing.

11. The defendant, because of its failure to file with the Federal Trade Commission on or before April 1, 1948, the report required by its order of September 2, 1947, is liable to pay to the United States a forfeiture in the sum of $100 for each and every day of the continuance of such failure.

Wherefore, Plaintiff Demands:

1. That the court issue a mandatory injunction commanding defendant, its agents, attorneys, employees and assigns to file with the Federal Trade Commission the report required by its order dated September 2, 1947.

2. Judgment against defendant in the amount of $100 a day for each and every day from and after April 1, 1948, the defendant has failed to file with the Federal Trade Commission the report required by its order of September 2, 1947.

3. That defendant pay the costs of this action.

4. That plaintiff be given such other and further relief as the court may deem just and proper.

United States of America,
By Otto Kerner, Jr.,
*United States Attorney,*
Chicago, Illinois.

J. Stephen Doyle,
*Special Assistant to the Attorney General,*
United States Department of Justice,
Washington, D. C.

Joseph S. Wright,
*Assistant General Counsel,*
Federal Trade Commission,
Washington, D. C.

J. B. Truly,
*Special Attorney,*
Federal Trade Commission,
Washington, D. C.

11 District of Columbia, } ss.
City of Washington. }

Otis B. Johnson, being first duly sworn, deposes and says that he is the Secretary of the Federal Trade Commission; that he makes this affidavit on behalf of the plaintiff in the foregoing complaint; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true.

Otis B. Johnson.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 3rd day of May, 1948.

Denis E. Connell,
(Seal) *Notary Public.*

My commission expires March 11, 1951.

12 Exhibit A.

## Rule XXVI.

### Reports Showing Compliance With Orders and With Stipulations.

In every case where an order to cease and desist is issued by the Commission for the purpose of preventing violations of law and in every instance where the Commission approves and accepts a stipulation in which a party agrees to cease and desist from the unlawful methods, acts, or practices involved, the respondents named in such orders and the parties so stipulating shall file with the Commission, within sixty days of the service of such order and within sixty days of the approval of such stipulation, a report, in writing, setting forth in detail the manner and form in which they have complied with said order or with said stipulation; provided, however, that if within the said sixty (60) day period respondent shall file petition for review in a circuit court of appeals, the time for filing report of compliance will begin to run de novo from the

final judicial determination; and provided further that where the order prevents the use of a false advertisement of a food, drug, device, or cosmetic, which may be injurious to health because of results from such use under the conditions prescribed in the advertisement, or under such conditions as are customary or usual, or if the use of such advertisement is with intent to defraud or mislead, an interim report stating whether and how respondents intend to comply shall be filed within ten days.

13 Within its sound discretion, the Commission may require any respondent upon whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order or with said stipulation.

Reports of compliance shall be signed in ink by respondents or by the parties stipulating.

14 Exhibit B.

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1 International Salt Co.
(Signature or name of addressee)
2 P. W. Griggs
(Signature of addressee's agent—Agent should enter addressee's name on line One above)

Date of delivery Sep. 4, 1947.
(Pencil notation) 4320 Order requiring additional reports of compliance from certain respondents 50.

Post Office Department.
Official Business

Penalty for Private Use
To Avoid Payment
of Postage, $300
(GPO)

Postmark of Delivering Office

Return to Federal Trade Commission
(Name of Sender)

Street and Number,
or Post Office Box _____
Washington, D. C.

Registered Article
No. 370301
Insured Parcel

No. _____

15 Exhibit C.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 22nd day of September, A. D. 1947.

Commissioners:

Garland S. Ferguson, Chairman,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer,
Lowell B. Mason.

In the Matter of
Salt Producers Association, *et al.* } Docket No. 4320.

ORDER EXTENDING TIME FOR FILING ADDITIONAL REPORTS OF COMPLIANCE.

This matter coming on to be considered by the Commission upon the request of counsel for respondent Hardy Salt Company for an extension of time until November 1, 1947, within which to file additional reports of compliance pursuant to the Commission's order requiring same under date of September 2, 1947, and the Commission having duly considered said request, and being fully advised in the premises:

It Is Ordered that the time for filing additional reports of compliance pursuant to the order requiring such reports entered on September 2, 1947, be, and the same hereby is, extended for all respondents subject to such order until November 1, 1947.

By direction of the Commission:

Otis B. Johnson,
*Secretary.*

16 **Exhibit D.**

**Return Receipt**

---

**Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.**

**1 International Salt Co.**
**(Signature or name of addressee)**
**2 P. W. Griggs**
**(Signature of addressee's agent—Agent should enter addressee's name on line One above)**

**Date of delivery Sep. 23, 1947.**

**(Pencil notation) 4320 Order extending time additional report of compliance 60.**

**Post Office Department**
**Official Business**

**Penalty for Private Use To Avoid Payment of Postage, $300**

**Postmark of Delivering Office**
**Scranton, Pa.**
**Sep 23**
**4:30 PM**
**1947**

**Return to Federal Trade Commission**
**(Name of Sender)**

**Street and Number, or Post Office Box**
**Washington, D. C.**

**Registered Article No. 370659**
**Insured Parcel**

**No.**

17 Exhibit E.

Return Receipt

---

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1 International Salt Co.
(Signature or name of addressee)
2 P. W. Griggs
(Signature of addressee's agent—Agent should enter addressee's names on line One above)

Date of delivery Mar. 1, 1948.

(Pencil notation) 4320 Notice of Default (International Salt Co.) 70

Post Office Department
Official Business

Penalty for Private Use
To Avoid Payment
of Postage, $300

Postmark of Delivering Office
Scranton, Pa.
Mar 1
9:30 PM
1948

Return to Federal Trade Commission
(Name of Sender)

Street and Number,
or Post Office Box _____
Washington, D. C.

Registered Article
No. 370544
Insured Parcel
No. _____

18 And afterwards on, to wit, the 26th day of May, 1948, there was filed in the Clerk's office of said Court a certain Summons, With Marshal's Return Endorsed Thereon, in words and figures following, to wit:

19 DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-699) * *

SUMMONS.

To the above named Defendant:

You are hereby summoned and required to serve upon Otto Kerner, Jr., U. S. Atty., plaintiff's attorney, whose address is 450 U. S. Court House, Chicago Ill., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Roy H. Johnson,
*Clerk of Court.*
By Marguerite Gilmour,
*Deputy Clerk.*

(Seal) [Seal of Court]

Date: May 18, 1948.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Served this writ, together with copy of complaint in the within named International Salt Co., a corporation, by delivering copies thereof to Louis H. Hall, Vice Pres., an agent of said corporation.

The president of said corporation not found in my district.

T. P. O'Donovan,
*U. S. Marshal.*
By Frank J. Reddy,
*Deputy.*

Served at U. S. C. H.
1 Service $2.00
Mileage $

Total $2.00

DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-699) * *

SUMMONS IN CIVIL ACTION.

Returnable not later than 20 days after service.
Filed May 26, 1948 at —— o'clock.

Roy H. Johnson,
*Clerk.*

Otto Kerner, Jr.,
*U. S. Atty., Attorney for Plaintiff.*

20 And afterwards on, to wit, the 8th day of June, 1948, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Answer And Proof Of Service Of Answer in words and figures following, to wit:

21 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-699) * *

The defendant, by Charles H. G. Kimball, Louis H. Hall and Frederic R. Sanborn, its attorneys, for its answer to the complaint herein, respectfully shows to this Honorable Court, as follows:

I. It alleges that heretofore and on or about the 10th day of November, 1941, the Federal Trade Commission made a certain cease and desist order against this defendant and against other respondents named therein, pursuant to the authority of Section 5 of the Federal Trade Commission Act, to which order it asks leave to refer at the trial of this action, should the terms and provisions of the said cease and desist order become material, with the same force and effect as if the same were set forth at full length herein.

II. It alleges that thereafter this defendant and certain other respondents named in the aforesaid cease and desist order of said Federal Trade Commission duly appealed to the Circuit Court of Appeals for the Seventh Circuit; that thereafter said appeal duly came on to be heard before the said Circuit Court of Appeals; that thereafter and on

or about the 20th day of April, 1943, the said Circuit Court of Appeals duly modified the aforesaid cease and desist order of said Federal Trade Commission; that the said decree of the said Circuit Court of Appeals has heretofore, and long prior to the commencement of the present action, become final; that a true copy of the said decree is hereto annexed as Exhibit A hereof with the same force and effect as if the same were set forth herein at full length.

22 III. It alleges that by reason of the premises the prior proceedings heretofore had before the Federal Trade Commission as aforesaid under Docket 4320 of the said Federal Trade Commission were terminated by, and were merged in, the final decree and order of the said Circuit Court of Appeals, and that in consequence thereof the only jurisdiction, power and authority now remaining and existing in this matter is vested solely in said Circuit Court of Appeals pursuant to the terms and provisions of its aforesaid order and decree.

IV. That after the said Circuit Court of Appeals had made its said decree and order as aforesaid, this defendant duly filed with said Federal Trade Commission a report in writing setting forth in detail the manner and form in which it had complied with said decree, and that said Federal Trade Commission received and retained the said report in writing without making any objection whatsoever thereto.

V. Upon information and belief, that the Federal Trade Commission has not made any application or petition to the said Circuit Court of Appeals to obtain any further order therein, in accordance with the terms and provisions of the aforesaid decree of said Circuit Court of Appeals retaining jurisdiction thereof; upon information and belief, that there are not any actions, proceedings, applications or petitions now pending before the Circuit Court of Appeals in said cause #7909; that by reason of the premises the sole remedy of the Federal Trade Commission, and the only method of due and orderly procedure, to prevent multiplicity of actions, conflicting decisions and the harassment of this and other defendants, is for the said Federal Trade Commission to bring forward before said Circuit Court of Appeals a proceeding, an application or a motion for

23 such relief as said Federal Trade Commission may conceive itself to be entitled to in accordance with the terms and provisions of said decree of said Circuit Court of Appeals.

VI. Defendant denies each and every one of the jurisdictional allegations of paragraph 1 of the complaint herein, and it likewise respectfully denies that this Honorable Court, or any District Court of the United States, has any jurisdiction whatsoever of the present action, civil action #48C699.

VII. It admits the allegations of the first sentence of paragraph 2 of the complaint. For the purposes of the present action only, it does not deny the allegations of the second sentence of paragraph 2 of the complaint.

VIII. It admits all of the allegations of paragraphs 3, 5, 6, 7 and 9 of the said complaint.

IX. It admits that Exhibit A annexed to the complaint and referred to in paragraph 4 thereof is a true and complete copy of Rule XXVI of the Rules of Practice of the Federal Trade Commission; it admits that on or about September 2, 1947, the Federal Trade Commission issued a purported order of which a true copy is set forth in said paragraph 4 of the complaint. Except as hereinabove specifically admitted, it denies each and every allegation of paragraph 4 of the complaint, and it alleges affirmatively that the Federal Trade Commission lacked lawful power and jurisdiction to make the said order and, if it is claimed that Rule XXVI is applicable to this defendant, that said Commission lacked lawful power and jurisdiction to promulgate and to apply the aforesaid Rule.

X. It alleges that, having duly reserved the jurisdictional question of the power and authority of the said Commission, it duly filed with said Commission, on or about
24 March 26, 1948, a further report in writing, a true copy of which is hereto annexed as Exhibit B, with the same force and effect as if the same were set forth at full length herein, setting forth in detail the manner and form in which it had continued to comply with said decree; that said Federal Trade Commissioin had received and has retained the said report without making any objection whatsoever thereto; that in consequence thereof defendant has complied with said purported order, and that it is not now and never has been in default thereof.

XI. It admits that the paper set forth in paragraph 8 of the complaint is a true and complete copy of a purported notice of default, dated February 27, 1948. Save as hereinabove specifically admitted, it denies each and every allegation of said paragraph 8 of the complaint.

XII. It denies each and every allegation contained in paragraphs 10 and 11 of the said complaint.

XIII. It further alleges that said purported order of September 2, 1947, was issued by the Federal Trade Commission without notice to it and without giving it an opportunity to be present and to be heard with respect thereto; that such action by the Federal Trade Commission was a denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States; and that, therefore, said purported order of September 2, 1947, is entirely null and void.

XIV. It further alleges that said Federal Trade Commission proceedings, Docket No. 4320, were filed under Title 15, U. S. Code, Section 45, being Section 5 of the Federal Trade Commission Act; that said purported order of September 2, 1947, of the Federal Trade Commission was entered under sub-sections 6(a) and 6(b) of said Act in connection with what purported to be an investigation of the compliance by the various respondents with said Final Decree of the United States Circuit Court of Appeals for the Seventh Circuit; and that the Federal Trade Commission is without lawful authority or jurisdiction to proceed under Sections 6 (a) and 6 (b) of said Act in connection with the attempted or purported enforcement of a degree of a Circuit Court of Appeals entered under Section 5 of said Act.

XV. It further alleges that said purported order of September 2, 1947, was issued in violation of the terms and provisions of the Fourth Amendment to the Constitution of the United States, in that it amounts to an illegal search and seizure of the books and records of the defendant.

XVI. It further alleges that the things required of it by said order of September 2, 1947, do not, nor does any of them, constitute a lawful or actual requirement to file an annual or special report within the meaning of said Section 10 of said Act for which the $100.00 per day penalty provision has been provided.

XVII. It further alleges that the procedure sought to be pursued by the Federal Trade Commission in the proceedings and in this action as set forth in the complaint and hereinabove referred to in this answer, are not reflected or set forth in any lawful rule of said Federal Trade Commission; nor has such procedure been duly published in the Federal Register as required and provided for under the

terms and provisions of Section 3 of the Administrative Procedure Act, 5 U. S. Code, Sections 1001-1011; and that the procedure attempted to be followed by said Federal Trade Commission as hereinabove referred to in the complaint and in this answer is in violation of the terms
26 and provisions of Section 6 of said Administrative Procedure Act,

Wherefore the defendant prays that the complaint herein be dismissed.

International Salt Company,
By Hervey J. Osborn,
*Vice President.*

Charles H. G. Kimball,
1620—134 South La Salle Street,
Chicago 3, Illinois.

Louis H. Hall,
165 Broadway,
New York 6, N. Y.

Frederic R. Sanborn,
165 Broadway,
New York 6, N. Y.

State of New York, }
County of New York. } ss.:

Hervey J. Osborn, being first duly sworn, deposes and says that he is a Vice President of International Salt Company, the defendant herein; that he makes this verification on behalf of the defendant in the foregoing answer; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

Hervey J. Osborn.

Subscribed and sworn to before me, Lois Johnston, a Notary Public in and for the County of New York and State of New York this 7th day of June, 1948.

Lois Johnston,
*Notary Public.*

(Seal)

Notary Public in the State of New York
Residing in New York County
New York County Clerk's No. 70
New York County Register's No. 108-J-O
Kings County Clerk's No. 34
Kings County Register's No. 83-J-O
Bronx County Clerk's No. 4.
Bronx County Register's No. 49-J-O
Commission Expires March 30, 1950

28 Exhibit "A".

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

Salt Producers Association, a corporation, *et al.*,
*Petitioners,*
*vs.*
Federal Trade Commission,
*Respondent.*
} No. 7909.

## FINAL DECREE AFFIRMING AND ENFORCING MODIFIED ORDER TO CEASE AND DESIST.

The petitioners herein, having filed with this Court on January 9, 1942, their petition to review and set aside an order to cease and desist issued by the Federal Trade Commission, respondent herein, under date of November 10, 1941, pursuant to the provisions of the Federal Trade Commission Act; and a copy of said petition having been served upon the respondent herein; and respondent having thereafter certified and filed herein, as required by law, a transcript of the entire record in the proceeding lately pending before it in which said order to cease and desist was entered, and the matter having been heard by this Court on briefs and oral argument and this Court thereafter on March 8, 1943 having rendered its decision that respondent is entitled to an order, and respondent having submitted to petitioners, pursuant to the Court's direction, a proposed order modifying its present order to meet the views expressed in the Court's opinion, and petitioners having been served with a copy of respondent's proposed modified order and having been heard with reference thereto;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that said modified order be, and the same hereby is, affirmed as follows:

* * * that the Salt Producers Association, a corporation, Avery Salt Company, a corporation, Barton Salt Company, a corporation, The Carey Salt Company, a corporation, Cayuga Rock Salt Company, a corporation, Colonial Salt

Company, a corporation, Detroit Rock Salt Company, a corporation, Diamond Crystal Salt Co., Inc., a corporation, International Salt Company, a corporation, Jefferson Island Salt Company, Inc., a corporation, Hardy Salt Company, a corporation, Morton Salt Company, a corporation, Myles Salt Company, Ltd., a corporation, Mulkey Salt Company, a corporation, Ohio Salt Company, a corporation, Rugg·les & Rademaker Salt Company, a corporation, Saginaw Salt Products Company, a corporation, Union Salt Company, a corporation, Watkins Salt Company, a corporation, Worcester Salt Company, a corporation, American Salt Corporation, a corporation, their officers, servants,
29 agents, and employees, and Stevenson, Jordan and Harrison, Inc., Charles R. Stevenson and D. M. Metzger, respectively president and treasurer of said Stevenson, Jordan and Harrison, Inc., and their agents, servants, and employees, or any two or more of said parties, with or without the cooperation of others not parties hereto, in connection with the offering for sale, sale, and distribution of salt in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, or carrying out, or directing, instigating or cooperating in, any planned common course of action, mutual agreement, combination, or conspiracy, to fix or maintain the prices of salt or curtail, restrict, or regulate the production or sale thereof, and from doing any of the following acts or things pursuant to any such planned or agreed common course of action:

(1) Establishing or maintaining uniform prices for salt, or uniform terms and conditions in the sale thereof, or in any manner agreeing upon, fixing, or maintaining any prices, including terms and conditions of sale, at which salt is to be sold;

(2) Adhering, or promising to adhere, to be filed or published prices or terms and conditions of sale for salt pending the filing of changes therein with the Salt Producers Association, or with any other agency, or with each other;

(3) Continuing the delivered price zones heretofore used for making quotations and sales of salt, or establishing or maintaining any delivered price zones which are similar to those heretofore used in that their use would result as heretofore in making the delivered prices of the respective corporations identical despite their different costs of delivery;

(4) Exchanging, directly or through the Salt Producers' Association, or any other agency or clearing house, price lists, invoices, and other records of sale showing the quantity, current prices and terms and conditions of sale allowed by said corporations to dealers and distributors; provided, however, that nothing herein shall prevent said association from collecting and disseminating to the respective manufacturers figures showing the total volume of sales of salt without disclosing the sales volume of individual producers, for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt;

(5) Exchanging, directly or through the medium of the Salt Producers Association, or any other agency, the names of distributors or dealers who receive special discounts; for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt;

(6) Curtailing, restricting, or regulating the quantity of salt to be produced and sold by said corporations by any method or means during any given period of time for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt;

(7) Doing, or causing to be done, any of the things forbidden by this order through the medium of said Stevenson, Jordan and Harrison, Inc., Charles R. Stevenson or D. M. Metzger, or any other corporation, firm or individual.

* * * That Stevenson, Jordan and Harrison, Inc., and Charles R. Stevenson and D. M. Metzger as officers thereof, and their agents, servants, and employees, do forthwith cease and desist from doing or performing any of the things forbidden by this order, or aiding, assisting, or cooperating in the performance thereof.

* * * that nothing in this order is to be construed as prohibiting any of said corporations from entering into such contracts or agreements relating to the maintenance of resale prices as are not prohibited by the provisions of an Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (The Sherman Act), as amended.

* * * that for the reasons appearing in the findings as to the facts the complaint herein be, and hereby is, dismissed as to the following: T. N. Harrison, C. H. Ferris, N. M. Ferris, E. G. Ackerman, A. H. Dyer, R. E.

Case, F. L. Sweetser, W. R. Guthrie, A. P. Nonweiler, D. M. Hudson, R. R. Bliss, L. B. Platt, and Howard Marvin.

It Is Hereby Further Ordered, Adjudged and Decreed that said modified order, in the terms above set forth, is hereby made the decree of this Court, and petitioners are hereby commanded to obey the same, without prejudice to the right of the United States, as provided in Section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violations of the said modified order to cease and desist hereby affirmed, and without prejudice to the right of the Federal Trade Commission to initiate contempt proceedings for violations of this decree.

It Is Hereby Further Ordered, Adjudged and Decreed that within ninety (90) days after the entry of this decree, the petitioners shall file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which they have complied therewith.

This Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof, and retains jurisdiction to modify the decree if changed future conditions should warrant such modification.

By the Court:

Evan A. Evans,
William M. Sparks,
Otto Kerner,
*United States Circuit Judges.*

31 Exhibit "B".

March 26, 1948.

Federal Trade Commission,
Washington, D. C.

Gentlemen:

Reference is hereby made to the order of the Commission issued September 2, 1947 entitled "In the Matter of Salt Producers Association et al., Docket No. 4320", and the order dated February 27, 1947 entitled in the same matter and designated "Notice of Default to International Salt Company."

The undersigned, International Salt Company, respectfully represents that, pursuant to the order of the Commis-

sion entered November 10, 1941, as affirmed and modified by the United States Circuit Court of Appeals for the Seventh Circuit by order dated April 20, 1943, respondent, International Salt Company, duly filed, within the period limited by the said order of the Circuit Court of Appeals of the United States for the Seventh Circuit, its Report of Compliance with the terms of the said decree of said court, and that it has ever since complied with the said order and continues to comply therewith in manner and form as set forth in the said report. This respondent further respectfully represents that the Federal Trade Commission is without authority, power or jurisdiction under the said decree of the Circuit Court of Appeals for the Seventh District, or under Rule 26 of the Commission's published Rules of Practice, or the authority granted in subsections (a) and (b) of Section 6 of the Federal Trade Commission Act, or otherwise, to require this respondent to file an additional and supplemental report setting forth the matters and things specified in said order of the Commission dated September 2, 1947, and said Notice of Default dated February 27, 1948.

International Salt Company,
By H. J. Osborn,
*Vice President.*

32 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-699) * *

## PROOF OF SERVICE OF ANSWER ON PLAINTIFF.

Received a copy of the defendant's Answer in the above entitled cause this 8th day of June, A. D. 1948.

Otto Kerner, Jr.,
*U. S. Atty.*
G. S. Morgan,
*Attorney for Plaintiff.*

33 And afterwards on, to wit, the 23rd day of June, 1948 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Notice And Motion For Summary Judgment, Affidavit of Frederic R. Sanborn, and Schedules A and B in words and figures following, to wit:

34 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-699) * *

To: Otto Kerner, Jr., Esq., United States Attorney,
Attorney for Plaintiff,
450 U. S. Court House,
Chicago, Illinois.

NOTICE AND PROOF OF SERVICE.

Please Take Notice that on this 23rd day of June, A.D. 1948, I shall file with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, a Motion for Summary Judgment in the above entitled cause, supported by affidavit.

Charles H. G. Kimball,
*Attorney for defendant,*
1620—134 South LaSalle Street,
Chicago, Illinois.
FRA 2266.

Received a copy of the above Notice and Proof of Service, together with a copy of the Motion for Summary Judgment and supporting affidavit referred to therein.

Otto Kerner, Jr.,
*Attorney for Plaintiff.*

35 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-699) * *

## MOTION FOR SUMMARY JUDGMENT

Comes now International Salt Company, defendant, by Charles H. G. Kimball, its attorney, and, pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves the Court to enter a summary judgment in favor of the defendant, dismissing this action on the ground that there is no genuine issue between the plaintiff and the defendant as to any material fact, and that the defendant is entitled to judgment dismissing the action as a matter of law upon the uncontested facts set forth in the complaint and in the answer herein; or,

In the alternative, if summary judgment is not rendered in defendant's favor upon the whole case or for all the relief asked, and a trial is necessary, defendant moves that the Court, at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts exist without substantial controversy, and what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear to be without substantial controversy, and directing such further proceedings in this action as to it may seem just.

This motion is based upon:

(a) The complaint herein and its accompanying exhibits;

36 (b) The answer herein and its accompanying exhibits; and

(c) The annexed affidavit of Frederic R. Sanborn, verified June 18, 1948.

International Salt Company,
*Defendant,*

By Charles H. G. Kimball,
*Its Attorney.*

37 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-699) * *

State of New York, }
County of New York. } ss:

Frederic R. Sanborn, being first duly sworn, deposes and says:

I am an attorney and counselor at law duly admitted and qualified to practice in the State of New York, and also before the Supreme Court of the United States of America.

I am familiar with the pleadings herein, and also with the earlier proceedings and pleadings (both before the Federal Trade Commission and before the United States Circuit Court of Appeals for the Seventh Circuit) which antedate the present action, but which are referred to in the pleadings herein.

I make the present affidavit on behalf of defendant in support of the present motion for the reasons that said defendant is a corporation and incapable of taking oath on its own behalf, and because I am familiar with all of the said proceedings and pleadings.

The present action is particularly suitable for summary judgment because I believe there are no factual disputes of any sort, and consequently the entire controversy is one of law and not of fact.

As appears from the complaint and from the answer herein, there was a proceeding involving this defendant (among others) before the Federal Trade Commission
38 some years ago which terminated in a final decree by the United States Circuit Court of Appeals for the Seventh Circuit (Answer: Exhibit A). That court in and by its final decree of April 20, 1943, retained jurisdiction over future proceedings as in said decree set forth.

Thereafter this defendant promptly, and in obedience to the said decree, filed with the Federal Trade Commission a statement on or about July 12, 1943, which, in the practice of the Federal Trade Commission, is sometimes called a Certificate of Compliance. A true copy of this report is hereto annexed as Schedule A hereof. This was received and at all times thereafter retained by the Federal Trade Commission without objection.

I am informed and verily believe that administrative changes were made within the Federal Trade Commission some months ago, in the course of which a new "Division of Compliance" was created.

This new "Division of Compliance" has apparently decided to attempt to create new forms of procedure, thirty-four years after the Federal Trade Commission was first established, and to claim to have and to exercise powers which, for the said thirty-four years last past, upon information and belief, the Federal Trade Commission has never at any time claimed to have or to exercise.

Accordingly, and on September 2, 1947, acting ex parte the Federal Trade Commission made an order which required of this defendant that it furnish the Commission with certain information (Complaint, pp. 3-4), thus bypassing the United States Circuit Court of Appeals for the Seventh Circuit and its retained jurisdiction to enforce the decree in question.

39 This defendant, acting under the advice of its counsel, took the position that the said "Division of Compliance" of said Commission was, without justification of law, seeking to beget a novel power which the Commission does not possess in the light of all the facts and circumstances of the present case.

Nevertheless, but reserving the matter of procedure and the questions of law, this defendant again filed with the said Commission a further statement in writing, dated March 26, 1948, (Answer: Exhibit B), setting forth its continued compliance with the original decree of the said Circuit Court of Appeals for the Seventh Circuit.

Meanwhile, and upon information and belief, the Chief of the Division of Compliance of the Federal Trade Commission, Joseph S. Wright, Esq., had called in person at Detroit, at the office of a corporation which was one of the other respondents before the Federal Trade Commission in the particular proceeding already described hereinabove and in the complaint and in the answer as Federal Trade Commission Docket #4320. James B. Wescott, Esq., of the law firm of Miller, Gorham, Wescott & Adams, was and is the general counsel for said other respondent, and, upon information and belief, engaged in conversation with Mr. Wright, the Chief of the Division of Compliance of the Federal Trade Commission. Thereafter and on or about February 17, 1948, Mr. Wright wrote Mr. Wescott

a letter concerning the conversation, and I annex hereto as Schedule B hereof what, upon information and belief, is a true copy of the said letter. A perusal of this letter will, I think, persuade this court beyond the shadow of any doubt that the recent proceedings of the Federal Trade Commission, and its purported order, dated September 2, 1947, referred to hereinabove, are simply and only steps in a novel attempt by the said Commission to enforce or to modify the aforesaid decree of the Circuit Court of Appeals of April 20, 1943, without submitting to the jurisdiction of that court, and in the endeavor to bypass the jurisdiction of that court.

The present litigation was commenced thereafter.

All of the documents necessary for the disposition of this motion, and referred to hereinabove are either contained in the complaint and answer, or are judicial decrees and written documents concerning the existence and phraseology of which there is no factual dispute.

The questions to be decided by this court include, in consequence, questions of law involving the retained jurisdiction and power of the Circuit Court of Appeals for the Seventh Circuit, and the remaining jurisdiction and powers, if any, thereafter of the Federal Trade Commission and of this Honorable Court, together with cognate legal problems.

Therefore I respectfully submit that the present case is a perfect case for summary judgment, and I respectfully request that summary judgment be granted in this action in favor of the defendant, dismissing the claims set forth in the complaint herein.

Frederic R. Sanborn.

Sworn to before me this 18th day of June, 1948.

Bertha E. Ronner
*Notary Public in the State of New York*
Residing in Kings County
Kings Co. Clk's No. 516, Reg. No. 50-R-9
N. Y. Co. Clk's No. 321, Reg. No. 45-R-9
Commission Expires March 30, 1949.

41 Schedule "A".

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

In the Matter of
Salt Producers Association *et al.* } Docket No. 4320.

REPORT OF INTERNATIONAL SALT COMPANY AS TO COMPLIANCE WITH ORDER TO CEASE AND DESIST ENTERED IN THE ABOVE MATTER AS SUCH ORDER WAS MODIFIED AND CONFIRMED BY DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, ENTERED APRIL 20, 1943.

In conformity with the above mentioned decree of the United States Circuit Court of Appeals for the Seventh Circuit requiring that within ninety (90) days after entry of the decree the undersigned should file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which it has complied with the said order of the Federal Trade Commission as so modified and affirmed, International Salt Company does report as follows:

1. International Salt Company, its officers, servants and employees, since the making of the said order to cease and desist, have refrained from entering into, continuing, or carrying out, or directing, instigating, or cooperating in any planned common course of action, mutual agreement, combination or conspiracy to fix or maintain the prices of salt, or curtail, restrict or regulate the production or sale thereof, and in future will so refrain.

2. Since the entry of said order to cease and desist, International Salt Company has not been, and will not in the future be, a party to any planned or agreed common course of action in conjunction with any one or more of the parties to the said entitled proceeding, with or
42 without the cooperation of others not parties thereto, in establishing or maintaining uniform prices for salt, or uniform terms and conditions in the sale thereof, or

in any manner agreeing upon, fixing, or maintaining any prices, including terms and conditions of sale, at which salt is to be sold. The prices at which International Salt Company sells its product, and the terms and conditions of the sale thereof have been, since the entry of the said order, and in the future will be, established by International Salt Company acting independently of all others.

3. Since the entry of the said order to cease and desist, International Salt Company has not, pursuant to any planned or agreed common course of action or otherwise, adhered or promised to adhere to filed or published prices or terms and conditions of sale of salt pending the filing of changes therein within the Salt Producers Association, or with any other agency, or any other producer.

4. Since the making of the said order to cease and desist, International Salt Company has not continued any price zone heretofore used for making quotations and sales of salt, or established or maintained any delivered price zones which are similar in any respect to price zones heretofore used, pursuant to any agreed or common course of action. Certain of its products it sells upon a delivered price basis, and certain others of its products it sells upon the basis of a price f. o. b. its own works, so that the cost to its customer is its f. o. b. plant price, plus transportation charges to destination. Where special conditions, such as, among others, lower prices quoted by competitors or lower transportation costs from competitors works, make such action necessary in order to obtain desired business, it may lower its plant price or its delivered price.

43 The prices it charges for its products will vary from time to time and in different localities, such fluctuations in price resulting from various causes, such as, among many others, governmental regulation, transportation conditions and competition. Whatever variation or fluctuation in price from time to time may occur, price changes will be determined according to the best judgment of its management in pursuit of the general policy of so lawfully conducting its business as to procure for its stockholders a reasonable profit from its operations. No quotation for salt, whether upon a delivered price basis or otherwise, has been, since the entry of the said order to cease and desist, or will be in the future, the result of or in accordance with any planned or agreed common course of action with any other respondent, or with

any other producer, or with any one outside International Salt Company's own organization.

5. Since the entry of said order to cease and desist International Salt Company has not directly or through the Salt Producers Association or any other agency or clearing house exchanged, and will not in the future exchange, price lists, invoices and other records of sale showing the quantity, current prices and terms and conditions of sale allowed to dealers and distributors.

6. Since the entry of said order to cease and desist, International Salt Company has not, pursuant to any planned or agreed common course of action, or otherwise, exchanged, and will not in the future exchange, directly or through the medium of the Salt Producers Association or any other agency, the names of distributors or dealers who receive special discounts for the purpose or with the effect of restricting competition in the offering for sale or sale of salt.

44 7. Since the entry of the said order to cease and desist, International Salt Company has not, pursuant to any planned or agreed common course of action with the other respondents named in the said proceeding, or with any other producer, curtailed, restricted or regulated the quantity of salt produced and sold by any method or means during any given period of time for the purpose or with the effect of restricting competition in the offering for sale, or sale, of salt and will not in the future so curtail, restrict or regulate the quantity of salt to be produced and sold.

8. Since the entry of the said order to cease and desist, International Salt Company has not done, or caused to be done any of the things forbidden by said order to be done through the medium of Stevenson, Jordan and Harrison, Inc., Charles R. Stevenson or D. M. Metzger, or any other corporation, firm or individual. Any association of this respondent with said Stevenson, Jordan and Harrison, Inc., Charles R. Stevenson or D. M. Metzger was terminated long prior to the institution of the above entitled proceeding.

9. For the information of the Commission, this respondent respectfully begs leave to submit the following.

Named in the bill of complaint in this proceeding, in the order to cease and desist, and in the decree of the said United States Circuit Court of Appeals are "Detroit

Rock Salt Company, a corporation" and "Avery Salt Company, a corporation". In fact, said Avery Salt Company and said Detroit Rock Salt Company were not and are not parties to this proceeding for the reason that they were not in existence at the time process in this proceeding was issued and process therefore could not be served upon them. Long prior to the institution of the above entitled proceeding the said Avery Salt Company and the said Detroit Rock Salt Company had conveyed and transferred to this respondent all their property, business and good will and had ceased doing business, and had been formally and legally dissolved.

10. International Salt Company has in all things fully complied with the order of the Commission as amended by said decree and in future will continue so to do.

Respectfully submitted,

International Salt Company,

By Harry M. Griffiths,

*Vice President.*

Putney, Twombly & Hall,

*Attorneys for International Salt Company.*

By Louis H. Hall.

46 Schedule "B".

FEDERAL TRADE COMMISSION,
Washington 25.

Office of General Counsel.

February 17, 1948.

James B. Wescott, Esq.,
Miller, Gorham, Wescott & Adams,
One North LaSalle Street,
Chicago 2, Illinois.

Re: Docket No. 4320.
Salt Producers Association, et al.

Dear Mr. Wescott:

Your letter of February 16, 1948, is received and contents noted. With respect to your statement that you understood my position on the recent trip to Detroit to be that the inquiry conducted by Mr. Truly and myself might be related either to Docket No. 4320 or to a new investigation under Section 5, I have no recollection that there was any doubt but that the inquiry and request for information from Salt Producers Association was related to the proceeding in Docket No. 4320. As you yourself note, the letter of the Secretary of the Commission under date of January 26, 1948, made it perfectly clear that this was the purpose of the inquiry.

With regard to your request for my ideas on your suggestion that further action in this matter be deferred until after the decision of the Supreme Court in the Cement case; I fail to see that anything the Court might hold in the Cement case would affect or be relevant to the question of whether or not the respondents in Docket No. 4320 have been and are now complying with the Commission's order to cease and desist and the decree of the Circuit Court of Appeals.

Very truly yours,

(s) Joseph S. Wright,
*Chief, Division of Compliance.*

47 And afterwards on, to wit, the 24th day of June, 1948 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Notice And Motion in words and figures following, to wit:

48 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-699) * *

To: Otto Kerner, Jr., Esq., United States Attorney,
Attorney for Plaintiff,
450 U. S. Court House,
Chicago, Illinois.

NOTICE.

Please Take Notice that on June 24, A. D. 1948, at the opening of Court in the forenoon, or as soon thereafter as counsel may be heard, I shall appear before the Honorable Philip Sullivan, in the room usually occupied by him as a courtroom, in the United States Court House, Chicago, Illinois, and shall then and there move the Court for an order extending the time within which the defendant may file its brief in support of its Motion for Summary Judgment heretofore filed herein to and including July 15, 1948, at which time and place you may appear if you so see fit.

Charles H. G. Kimball,
*Attorney for Defendant,*
134 South LaSalle Street,
Chicago, Illinois.

Received a copy of the foregoing Notice, together with a copy of the Motion and proposed Order referred to therein, this 23rd day of June, A. D. 1948.

Otto Kerner, Jr.,
*Attorney for Plaintiff.*

49 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-699) * *

## MOTION.

The defendant, International Salt Company, by Charles H. G. Kimball, its attorney, hereby respectfully moves the Court to enter an order extending the time within which said defendant may file a brief in support of its Motion for Summary Judgment heretofore filed herein to and including July 15, 1948.

Charles H. G. Kimball,
*Attorney for Defendant,*
134 South La Salle Street,
Chicago, Illinois.

50 And on the same day, to wit, the 24th day of June, 1948, came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures following, to wit:

51 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-699) * *

## STIPULATION.

It Is Hereby Stipulated by and between the parties hereto, by their respective attorneys, that the time within which the Defendant, International Salt Company, may file its brief in support of its Motion for Summary Judgment heretofore filed herein, shall be extended to and including July 15, 1948.

Otto Kerner, Jr.,
*Attorney for Plaintiff.*

Charles H. G. Kimball,
*Attorney for Defendant.*

52 And on the same day, to wit, on the 24th day of June, 1948, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

53 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-699) * *

ORDER.

This Cause coming on to be heard upon the motion of International Salt Company, Defendant, by Charles H. G. Kimball, its attorney, and the Court being fully advised in the premises,

It Is, Therefore, Ordered, Adjudged and Decreed that the time within which the International Salt Company may file its brief in support of its Motion for Summary Judgment shall be in the same as hereby extended to and including July 15, 1948.

Enter:

Philip L. Sullivan,
*Judge.*

54 And afterwards on, to wit, the 15th day of July, 1948, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Two (2) Notices And Motion For Summary Judgment, Affidavit of Otis B. Johnson and Exhibit A, Pages 1, 2, 3 and 4 in words and figures following, to wit:

55 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA.

* * (Caption—48-C-699) * *

NOTICE.

To: Charles H. G. Kimball, Esq.
c/o Ashcraft & Ashcraft
1620—134 South La Salle Street
Chicago 3, Illinois

Please Take Notice that on Thursday, July 15, 1948, at the hour of ten o'clock a. m., or as soon thereafter as counsel may be heard, I shall appear before the Honorable Michael L. Igoe, Judge of the District Court of the United States, or before such other Judge as may be sitting in his place and stead, in the courtroom usually occupied by him in the United States Court House at Chicago, Illinois, and then and there pray the entry of an order granting the Government leave to file a Consolidated Brief in support of its Motion for Summary Judgment heretofore filed, and further pray the entry of an order extending the Government's time to answer the respondent's Brief filed this day to include the date of August 9, 1948; at which time and place you may appear if you so deem fit.

Otto Kerner, Jr.,
*United States Attorney.*

Received a copy of the above and foregoing Notice this 14th day of July, A. D. 1948.

Charles H. B. Kimball,
*Attorney for Defendant.*

56 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-699) * *

NOTICE.

To: Charles H. G. Kimball, Esq.,
c/o Ashcraft & Ashcraft,
1620—134 South La Salle Street,
Chicago 3, Illinois.

Dear Sir:

Please Take Notice that the attached motion for summary judgment, with supporting affidavit, is being this day filed with the Clerk of the United States District Court for the Northern District of Illinois, at the United States Courthouse, Chicago, Illinois, and will be brought on for hearing before the Court as soon as counsel can be heard.

Dated this 14th day of July, 1948.

United States of America,
By Otto Kerner, Jr.,
*United States Attorney,*
Chicago, Illinois.

Receipt of a copy of the above notice and a copy of a motion for summary judgment with supporting affidavit annexed thereto is hereby acknowledged this 14th day of July, 1948.

Charles H. B. Kimball,
*Attorney for Defendant.*

57 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-699) * *

MOTION FOR SUMMARY JUDGMENT

United States of America, plaintiff, by its attorneys, acting pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves this Court for a summary judgment in favor of the plaintiff on the ground that the complaint, the answer of the defendant, International Salt Company, and the affidavit attached to this motion establish that there is no genuine issue as to any material fact, and that on the

undisputed facts the plaintiff is entitled as a matter of law to the judgment and to the relief demanded in the complaint and for which it moves herein.

In support of this motion, the affidavit of Otis B. Johnson is attached hereto.

United States of America,
By Otto Kerner, Jr.,
*United States Attorney,*
Chicago, Illinois.

J. Stephen Doyle, Jr.,
*Special Assistant to the Attorney General,*
United States Department of Justice,
Washington, D. C.

Joseph S. Wright,
*Assistant General Counsel,*
Federal Trade Commission,
Washington, D. C.

J. B. Truly,
*Special Attorney,*
Federal Trade Commission,
Washington, D. C.

58 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-699) * *

## AFFIDAVIT.

District of Columbia }
City of Washington } ss.

Otis B. Johnson, being first duly sworn, deposes and says that he is the Secretary of the Federal Trade Commission; that he makes this affidavit on personal knowledge; that the Federal Trade Commission, on August 10, 1943, issued its modified order to cease and desist in a proceeding before the Commission entitled In the Matter of Salt Producers Association, a corporation, et al., Commission Docket Number 4320; that the defendant herein, International Salt Company, was one of the respondents before the Commission against whom that modified order to cease and desist was issued; that the said modified order to cease and desist was served on the said International Salt Company by registered mail on August 11, 1943; that a true and complete copy of the said modified order to cease and desist is attached to this affidavit as Exhibit A and is made a part hereof; that nine of the corporations named in the Commission's order dated September 2, 1947, which order is copied in full in paragraph 4 of the complaint herein, have complied with that order by filing the special reports required thereby.

Otis B. Johnson.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 13th day of July, 1948.

Denis E. Connell,
*Notary Public.*

(Seal)

My commission expires March 11, 1951.

59 Exhibit A.

## UNITED STATES OF AMERICA.

### Before Federal Trade Commission.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 10th day of August, A. D. 1943.

Commissioners:

Garland S. Ferguson, Chairman,
Charles H. March,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer.

In the Matter of Salt Producers Association, a corporation; Avery Salt Company; Barton Salt Company; Carey Salt Company; Cayuga Rock Salt Company; Colonial Salt Company; Detroit Rock Salt Company; Diamond Crystal Salt Company, Inc.; International Salt Company; Jefferson Island Salt Company, Inc.; Hardy Salt Company; Morton Salt Company; Myles Salt Company, Ltd.; Mulkey Salt Company; Ohio Salt Company; Ruggles & Rademaker Salt Company; Saginaw Salt Products Company; Union Salt Company; Watkins Salt Company; Worcester Salt Company; American Salt Corporation; and Stevenson Corporation, a corporation, and its officers, Charles R. Stevenson, T. M. Harrison, C. H. Ferris, N. M. Perris, E. G. Ackerman, A. H. Dyer, R. E. Case, F. L. Sweetser, W. R. Guthrie, A. P. Nonweiler, S. M. Hudson, R. R. Bliss, L. B. Platt, Howard Marvin and D. M. Metzger, a partnership, doing business under the firm name of Stevenson, Jordan and Harrison.

Docket No. 4320

## MODIFIED ORDER TO CEASE AND DESIST.

This proceeding coming on for further hearing before the Federal Trade Commission, and it appearing that

60 on November 10, 1941, the Commission made its findings as to the facts herein and concluded therefrom that respondents had violated the provisions of the Federal Trade Commission Act, and issued and subsequently served upon them its order to cease and desist; and it further appearing that respondents on January 9, 1942, filed in the United States Circuit Court of Appeals for the Seventh Circuit petition to review and set aside the Commission's order, and that on March 8, 1943, the said court rendered its opinion and on April 20, 1943, issued its decree modifying the aforesaid order of the Commission in certain particulars and affirming the order in other particulars:

Now, Therefore, pursuant to the provisions of Subsection (i) of Section 5 of the Federal Trade Commission Act, the Commission issues this its modified order to cease and desist in conformity with said decree:

It Is Ordered that the respondents Salt Producers Association, a corporation, Avery Salt Company, a corporation, Barton Salt Company, a corporation, The Carey Salt Company, a corporation, Cayuga Rock Salt Company, a corporation, Colonial Salt Company, a corporation, Detroit Rock Salt Company, a corporation, Diamond Crystal Salt Co., Inc., a corporation, International Salt Company, a corporation, Jefferson Island Salt Company, Inc., a corporation, Hardy Salt Company, a corporation, Morton Salt Company, a corporation, Myles Salt Company, Ltd., a corporation, Mulkey Salt Company, a corporation, Ohio Salt Company, a corporation, Ruggles & Rademaker Salt Company, a corporation, Saginaw Salt Products Company, a corporation, Union Salt Company, a corporation, Watkins Salt Company, a corporation, Worcester Salt Company, a corporation, American Salt Corporation, a corporation, their officers, servants, agents, and employees, and Stevenson, Jordan and Harrison, Inc., Charles R. Stevenson and D. M. Metzger, respectively president and treasurer of said Stevenson, Jordan and Harrison, Inc., and their agents, servants, and employees, or any two or more of said respondents, with or without the cooperation of others not parties hereto, in connection with the offering for sale, sale, and distribution of salt in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, or carrying out, or directing, instigating, or cooperating in, any planned common course of action, mutual agreement, combination, or conspiracy, to fix or main-

tain the prices of salt or curtail, restrict or regulate the production or sale thereof, and from doing any of the following acts or things pursuant to any such planned or agreed common course of action:

61 (1) Establishing or maintaining uniform prices for salt, or uniform terms and conditions in the sale thereof, or in any manner agreeing upon, fixing, or maintaining any prices, including terms and conditions of sale, at which salt is to be sold;

(2) Adhering, or promising to adhere, to filed or published prices or terms and conditions of sale for salt pending the filing of changes therein with the Salt Producers Association, or with any other agency, or with each other;

(3) Continuing the delivered price zones heretofore used for making quotations and sales of salt, or establishing or maintaining any delivered price zones which are similar to those heretofore used in that their use would result as heretofore in making the delivered prices of the respective corporations identical despite their different costs of delivery;

(4) Exchanging, directly or through the Salt Producers Association, or any other agency or clearing house, price lists, invoices and other records of sale showing the quantity, current prices and terms and conditions of sale allowed by said corporations to dealers and distributors; provided, however, that nothing herein shall prevent said association from collecting and disseminating to the respective manufacturers figures showing the total volume of sales of salt without disclosing the sales volume of individual producers, for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt;

(5) Exchanging, directly or through the medium of the Salt Producers Association, or any other agency, the names of distributors or dealers who receive special discounts; for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt;

(6) Curtailing, restricting, or regulating the quantity of salt to be produced and sold by said corporations by any method or means during any given period of time for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt;

62 (7) Doing, or causing to be done, any of the things forbidden by this order through the medium of said Stevenson, Jordan and Harrison, Inc., Charles R. Steven-

son or D. M. Metzger, or any other corporation, firm or individual.

It Is Further Ordered that Stevenson, Jordan and Harrison, Inc., and Charles P. Stevenson and D. M. Metzger as officers thereof, and their agents, servants, and employees, do forthwith cease and desist from doing or performing any of the things forbidden by this order, or aiding, assisting, or cooperating in the performance thereof.

It Is Further Ordered that nothing in this order is to be construed as prohibiting the respondents from entering into such contracts or agreements relating to the maintenance of resale prices as are not prohibited by the provisions of an Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (the Sherman Act), as amended.

It Is Further Ordered that for the reasons appearing in the findings as to the facts the complaint herein be, and hereby is, dismissed as to the following respondents: T. M. Harrison, C. H. Ferris, N. M. Perris, E. G. Ackerman, A. H. Dyer, R. E. Case, F. L. Sweetser, W. R. Guthrie, A. P. Nonweiler, S. M. Hudson, R. R. Bliss, L. B. Platt, and Howard Marvin.

By the Commission.

Otis B. Johnson,
*Secretary.*

63 And on the same day, to wit, the 15th day of July, 1948, there was filed in the Clerk's office of said Court a certain Proof Of Service Of Brief in words and figures following, to wit:

64 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA.

* * (Caption—48-C-699) * *

## PROOF OF SERVICE OF BRIEF.

The undersigned hereby acknowledges the receipt of a copy of the brief of the Defendant in support of the Motion for Summary Judgment heretofore filed herein by the Defendant this 15th day of July, A. D. 1948.

Otto Kerner, Jr.,
*United States Attorney.*

65 And on the same day, to wit, on the 15th day of July, 1948, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge; appears the following entry, to wit:

66 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-699) * *

On motion of the plaintiff by the United States Attorney it is

Ordered that leave be and it is hereby granted to the plaintiff to file a consolidated brief herein and that the time within which to file answer to the defendant's brief be and it is hereby extended to and including August 9, 1948.

67 And afterwards on, to wit, the 27th day of July, 1948, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion in words and figures following, to wit:

68 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA.

* * (Caption—48-C-699) * *

## MOTION.

Comes now International Salt Company, Defendant, by Charles H. G. Kimball, its attorney, and respectfully prays that an order may be entered extending the time within which said Defendant may file its brief in answer to the brief heretofore filed herein by Plaintiff in support of Plaintiff's Motion for Summary Judgment to and including August 9, 1948, per Stipulation filed herewith.

International Salt Company,
*Defendant,*
By Charles H. G. Kimball,
*Its Attorney.*

69 And on the same day, to wit, the 15th day of July, 1948, came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures following, to wit:

70 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA.

* * (Caption—48-C-699) * *

## STIPULATION.

Comes now United States of America, Plaintiff, and International Salt Company, Defendant, by their respective attorneys and hereby stipulate that the time within which said Defendant, International Salt Company, may file its brief in answer to the brief heretofore filed herein by the Plaintiff in support of the Plaintiff's Motion for Summary Judgment, shall be extended to and including August 9, 1948.

United States of America,
*Plaintiff.*
By Otto Kerner, Jr.,
*Its Attorney.*

International Salt Company,
*Defendant.*
By Charles H. G. Kimball,
*Its Attorney.*

71 And on the same day, to wit, on the 27th day of July, 1948, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

72 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-699) * *

On stipulation of the parties by counsel filed herein it is Ordered that the time of the defendant within which to file answering brief in re the plaintiff's motion for a summary judgment be and it is hereby extended to August 9, 1948.

73 And afterwards on, to wit, the 4th day of August, 1948, there was filed in the Clerk's office of said Court a certain Proof Of Service Of Brief in words and figures following, to wit:

74 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-699) * *

PROOF OF SERVICE OF BRIEF.

The undersigned hereby acknowledges the receipt of a copy of Defendant's brief in reply to Plaintiff's brief heretofore filed herein in support of Plaintiff's Motion for Summary Judgment.

Otto Kerner, Jr.,
*United States Attorney.*

75 And afterwards on, to wit, the 19th day of August, 1948, there was filed in the Clerk's office of said Court a certain Memorandum Of The Honorable Philip L. Sullivan, District Judge, in words and figures following, to wit:

76 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-698-699) * *

MEMORANDUM.

These actions are before the Court upon complaint filed by the United States which seek the enforcement of an order of the Federal Trade Commission dated September 2, 1947, requiring the defendants, and other corporations named in that order, to file special reports with the Federal Trade Commission within thirty days from the date of service. The complaint also seeks judgment against defendants for forfeiture in the sum of $100.00 per day for each day from and after April 1, 1948, that defendants have failed to file with the Federal Trade Commission the reports required by the order of September 2, 1947.

Each defendant has answered and filed a motion for summary judgment. The Government also has filed its
77 motion for summary judgment. All parties are agreed

that there is no genuine issue as to any material fact involved in the case.

Since the issues of law raised by the pleadings in the two actions are identical, the Court is considering both cases as one.

The suits grow out of the order of the Federal Trade Commission dated September 2, 1947, requiring these two defendants among others to file special reports with the Commission, the order reciting that it was issued in the public interest pursuant to the authority granted the Commission by subsections (a) and (b) of Section 6 of the Federal Trade Commission Act, and pursuant to Rule XXVI of the Commission's Rules promulgated under subsection (g) of Section 6, claimed to implement the authority granted the Commission by subsection 6(b) "To require, by general or special orders, corporations engaged in commerce • • • to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing." The default order
78 of February 27, 1948, charging that defendants had failed to comply with the order of September 2, 1947, then followed.

Jurisdiction is founded on Section 9 of the Act which vests this Court with jurisdiction to command corporations to comply with any order of the Commission made pursuant to the Act, and on Section 10 which vests this Court with jurisdiction of suits of the United States for the recovery of forfeitures if corporations fail to file required reports within the time fixed by the Commission for filing the same.

Defendants in their answers have set out certain matters relating to a prior proceeding against them by the Commission under Section 5 of the Act, and it is agreed by both sides that the facts therein are as follows:

The Commission on September 18, 1940, issued its complaint under Section 5 of the Act charging defendants, and others, with engaging in an unlawful conspiracy to fix prices on, and to control the production of salt in connection with the sale and distribution of that commodity in

interstate commerce. Answers were filed by the defendants therein admitting the alleged conspiracy. On November 10, 1941, the Commission issued its order to cease and desist, requiring the defendants to discontinue the conspiracy alleged in the complaint and admitted in the answers. A petition for review of the Commission's
79 order was filed by the defendants in the Circuit Court of Appeals for the Seventh Circuit, which court rendered its opinion on March 8, 1943, reported as *Salt Producers Association* v. *Federal Trade Commission*, 134 Fed. (2) 354. On April 20, 1945, the Circuit Court of Appeals entered its decree modifying the Commission's order in certain respects, affirming it as modified and directing compliance therewith. On August 10, 1943, the Commission issued its modified order to cease and desist, as required by Section 5(i) of the Act, incorporating the changes directed by the Circuit Court of Appeals, and caused the same to be served on all of the defendants. In August, 1943, the respondents named in the decree of the Circuit Court of Appeals filed reports with the Commission showing the manner and form in which they were complying with the court's decree.

On September 2, 1947, the Commission alleges that it believed it was in the public interest to make a further investigation of the manner and form of compliance, and in aid of that investigation, pursuant to Sections 6(a) and 6(b) of the Act in aid of enforcement proceedings in Docket No. 4320 under Section 5 of the Act and pursuant to the Commission's Rule XXVI, issued its order requiring the defendants and others to file special compliance reports with the Commission within thirty days from the date of service, which was had on September 4, 1947. Later
80 the Commission by letter order extended the time until November 1, 1947. The Government urges that the reports were not filed and that separate notices of default, as it insists is provided for in Section 10 of the Act, as a prerequisite to subjecting defendants to the $100.00 a day forfeiture for failure to file, were issued by the Commission on February 27, 1948, and served on each defendant on March 1, 1948. The Commission alleges that the thirty days specified in Section 10 and in the notices expired on April 1, 1948, and insists that defendants' failure to file the required reports continued, and that each defendant notified the Commission writing that it would not comply with the

order, and therefore these suits were filed to compel them to do so and to obtain judgment in favor of the United States for $100.00 per day from each for each day they are in default.

In their answers the defendants set out that pursuant to the requirements of the final decree of the United States Circuit Court of Appeals for the Seventh Circuit, defendants filed their reports of compliance with the Federal Trade Commission, and that the Commission received said reports without making any objection thereto. That the order of September 2, 1947, does not require them to file an annual or special report within the meaning of Section
81 10 of said Act. That the procedure sought to be pursued by the Federal Trade Commission is not reflected or set forth in any Rule of said Federal Trade Commission, and has not been published in the Federal Register, as required by Section 3 of the Administrative Procedure Act, and that pursuant to the order of September 2, 1947, each defendant has filed an additional compliance report, by stating that it is complying in the same manner set out in its original compliance report.

The Commission insists that the present suits in ths court have nothing whatsoever to do with the prior proceeding under Section 5 of the Act, except insofar as the Commission's authority to investigate compliance with the decree and modified order to cease and desist have been questioned. The Commission insists that these suits are not for the purpose of enforcing compliance with the decree of the Circuit Court of Appeals or the Commission's modified order to cease and desist, nor have the defendants been charged with a violation of that decree or modified order. That the Commission is only seeking by an investigatory process authorized by law, to obtain the facts as to the manner and form in which defendants have complied with that decree and modified order.

Defendants urge that there is no published rule or statement of procedure of the Commission which specifies,
82 outlines or even refers to the use of Sections 6(a) and 6(b) or Section 10 of the Federal Trade Commission Act in aid of decrees entered under Section 5 of the Act, nor is there any reference in the Commission's Rules and Statements of Procedure to the procedure followed in the present proceedings. The former proceedings referred to as Docket No. 4320 when the matter was before the Fed-

eral Trade Commission, and as Case No. 7909 when it was in the Circuit Court of Appeals, were brought by the Federal Trade Commission under Section 5 of the Federal Trade Commission Act, and when the matter was on appeal before the Circuit Court of Appeals, that court, in its decree, reserved "jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof. * * *"

Section 5 of the Federal Trade Commission Act itself provides for enforcement proceedings with respect to decrees entered thereunder, and subsection (1) thereof reads:

> "(1) any person, partnership or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

83 A careful reading of the legislative history of the Act shows that Section 6 is only to be invoked in support of general economic surveys and not in aid of enforcement proceedings under a Section 5 decree. The Section 10 penalty provisions, on which the present proceeding is based, can be invoked only in connection with general economic survey proceedings under Section 6, and not in connection with enforcement proceedings under Section 5.

Where an appeal has been taken to the Circuit Court of Appeals, as was done in Docket No. 4320, Section 5 gives to the Circuit Court of Appeals sole jurisdiction of enforcement proceedings thereunder, and that court in order to enforce compliance with its decree specifically reserved jurisdiction of the cause, subject only to the Commission's right to pursue contempt proceedings in the Circuit Court of Appeals, or to collect the civil penalty provided by Section 5(1).

The commission's order of September 2, 1947, here involved, required these defendants to "file additional reports showing in detail the manner and form in which it has been and is now complying with said modified order to cease and desist." On October 31, 1947, these defendants advised the Commission in writing that they were complying in the same manner as set forth in their original compliance re-

ports filed in 1943, to which original reports no objec-
84 tion had ever been made by the Commission. The September 2, 1947 order also required the defendants, as a part of their additional reports, to submit a complete statement "of the prices, terms and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements distributed, published or employed in marketing salt from and after January 1, 1944."

Sections 6(a) and 6(b) provide for economic reports. Section 6(a) provides: "That the Commission shall also have power

> (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relations to other corporations and to individuals, associations, and partnerships.
>
> (b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or
85 answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission."

A reading of the legislative history of Sections 6(a) and 6(b) convinces me that these sections are designed for the purpose of compelling corporations to make annual reports, and giving the Commission authority within its discretion to require special reports when it deemed that advisable, but is not related in any way to the enforcement of the law. The Federal Trade Commission Act, Section 10, provides

that corporations shall be subject to the forfeiture of $100.00 a day only for failure to file annual reports and special reports when required by the Commission, in conformity with Section 6, but has no relation to the jurisdiction conferred by Section 5. At least two courts have in effect specifically denied the existence of any relationship between Section 5 and Section 6 of the Act. *Federal Trade Commission* v. *Miller's National Federation*, 47 Fed. (2) 428, where the court said:

> "The power of investigation conferred upon the Commission by Section 6 is different in character from the jurisdiction conferred by Section 5. Section 6 contemplates an investigation for the collection of facts for the information of Congress in aid of the exercise of its legislative function, or for the President in aid of recommending necessary legislation."

And in *Federal Trade Commission* v. *Claire Furnace*
86 *Co.*, 274 U. S. 160, where the Supreme Court makes the same distinction, quoted in this memorandum *infra*.

When Congress enacted the Federal Trade Commission Act the duties and powers of the new Commission seem to have been divided into two categories. The first category continued the power of investigation and publicity with respect to corporations formerly lodged in its predecessor, the Bureau of Corporations, and now contained in Sections 6(a) and 6(b) of the present Act. However, Congress added a new section, Section 10 providing for a forfeiture of $100.00 a day for failure to file the reports provided for in Sections 6(a) and 6(b). The second category into which the duties of the Federal Trade Commission were divided was provided by Section 5 which prohibits unfair methods of competition and provides the method for its enforcement and penalties. Subsection (a) of Section 5 provides that unfair methods of competition in commerce and unfair and deceptive acts or practices in commerce are declared to be unlawful, and also provides that the Commission has power to prevent the use of such unfair methods. Subsection (b) sets out the jurisdiction and procedure by which the Commission may prosecute acts involving unfair methods of competition. Subsection (c) provides the appellate procedure available to respondents against whom a cease and desist order has been entered. Subsection (d)
87 provides that "The jurisdiction of the Circuit Court of Appeals of the United States to affirm, enforce,

modify, or set aside orders of the Commission shall be exclusive." Subsections (g), (h), (i) and (j) set out the points of time at which a cease and desist order of the Commission becomes final.

I find nothing in Section 5 which gives the Commission power to modify or attempt to enforce, independently of the Circuit Court of Appeals, its original cease and desist order of 1943. Section 5 of the Federal Trade Commission Act is self-sufficient for enforcement proceedings with respect to decrees entered thereunder, and therefore the remedies available to the Commission are contempt proceedings in the Circuit Court of Appeals or penalty proceedings under Section 5(1) of the Act.

The United States contends that the Commission's order of September 2, 1947 indicates that the purpose of the Commission's investigation was to determine the manner and form of compliance with the Commission's modified order to cease and desist of November 10, 1941. That the Commission's order of September 2, 1947 only asked that the defendants file reports indicating the manner and form of defendants' compliance with the modified order of the
88 Commission to cease and desist and with the decree of the Circuit Court of Appeals. Defendants did file an additional compliance report with the Commission setting out that they were complying in the same manner as set forth in their original compliance reports filed in 1943. What defendants did not file is the documentary evidence requested by the Commission and not covered by Section 10 at all. Section 10 provides that only upon the failure of a corporation to file the annual or special reports referred to therein shall the penalty provision become operative. *United States* v. *National Biscuit Company*, 25 Fed. Supp. 329.

*Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160, was a bill in equity brought by various coal, steel and related industries to enjoin the Federal Trade Commission from enforcing order issued by the Commission requiring those companies to furnish monthly reports of production, balance sheets and other voluminous information in detail. Without questioning appellee's right to seek relief by injunction, the Federal Trade Commission answered, admitting the issuance of the orders, claiming authority therefor under Section 6, and 9, Federal Trade Commission Act. The cause was heard on a motion to strike

the answer, the court holding the answer insufficient, and granted the injunction. The Supreme Court said:

89 "Appellees were not charged with practicing unfair methods of competition (Section 5, Act of September 26, 1914) or violating the Clayton Act * * *. Orders under such charges can be enforced only through a Circuit Court of Appeals * * *.

"The action of the Commission here challenged must be justified, if at all, under the paragraphs of Sections 6 and 9, * * * and the only methods prescribed for enforcing orders permitted by any of these paragraphs are specified in Sections 9 and 10. They are applications to the Attorney General to institute an action for mandamus and proceedings by him to recover the prescribed penalties."

Sections 6(a) and 6(b) of the Act provide for economic investigations by the Commission from time to time as to the organization, business, conduct, practice and management of any corporation engaged in commerce, and for the filing of annual or special reports. The penalty applicable for failure to file these reports has no relation to failure to comply with an order requiring information as to the manner in which an order to cease and desist is being observed, and the supplemental compliance report here involved is not one required by the Act and is clearly not the kind of report set out in Section 6(a) or Section 6(b).

Defendants concede, and I agree, that notwithstanding the reservation of jurisdiction by the Circuit Court of Appeals in its decree, the Commission may investigate

90 any violations which it has reason to believe defendants are committing. In order to accomplish this the Commission may file a new complaint against defendants, alleging in what manner it considers that defendants are violating the Act. Or penalty proceedings under Section 5(1) may be initiated by the United States for alleged violations of the former decree in the Circuit Court of Appeals. Or contempt proceedings may be brought in the Circuit Court of Appeals.

The Commission insists that this is not a Section 5 proceeding, nor is it an attempt on the part of the Commission to enforce the decree of the Circuit Court of Appeals or the Commission's modified order to cease and desist; that it is purely an investigation to determine whether the defendants are complying with the former decree and the

Commission's order. It seems to me, however, that the Commission is attempting indirectly to use the power given to it under Section 5 in order to secure the information it seeks under Section 6(a) and 6(b).

The Commission insists that under Section 6(g) it has the power to make rules and regulations for the purpose of carrying out the provisions of this Act. That under this authority it has promulgated Rule XXVI providing for the filing of reports and supplemental reports showing
91 compliance with the Commission's orders. Defendants challenge this authority on the ground that nowhere in the Act is any statutory authority given to the Commission to require either compliance or supplemental compliance reports. The Commission also insists that Rule XXVI has nothing to do with Section 5 compliance reports, but is only in aid of economic survey reports under Section 6(b).

Subparagraph (a) of Rule XXVI provides for an original report of compliance with the Commission's cease and desist order. Subparagraph (b) sets out the right of the Commission to require from time to time, further supplemental reports of compliance. Subparagraph (c) provides how the reports shall be signed. Defendants urge that no court has ever declared this rule to be lawful, valid and enforceable; and that not until the present time, almost thirty-four years after the enactment of the Federal Trade Commission Act, has the Commission made an attempt to enforce subparagraph (b) thereof in a Section 5 proceeding. Nowhere in Section 5 can I find any reference whatever to compliance reports. Section 5 provides for the finality of a cease and desist order as soon as the jurisdiction of the Federal Trade Commission over it has been transferred to the Circuit Court of Appeals, but nowhere does Section 5 confer upon the Commission authority
92 to make rules, and no rule-making paragraph of any statute could confer upon an administrative body authority to substantially alter the explicit provisions of a statutory enactment such as Section 5 of the Federal Trade Commission Act.

For all of the reasons set out herein I am of the opinion that plaintiff's motion for summary judgment for a mandatory injunction commanding defendants to file the reports requested by the Commission's order of September 2, 1947, and for judgment against the defendants in the amount of

$100.00 a day for each day from and after April 1, 1948, should be denied.

Defendants' motions for summary judgment that defendants are not liable for the $100.00 a day penalty are allowed, and the complaint herein is dismissed for the reason that I believe this Court is without jurisdiction to entertain the same.

Philip L. Sullivan,
*Judge.*

August 19, 1948.

93 And afterwards, to wit, on the 20th day of August, 1948, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

94 In the District Court of the United States.

* * (Caption—48-C-699) * *

## ORDER.

This Cause Coming On To Be Heard on the complaint and the answer heretofore filed herein, and on the motion for summary judgment, with a supporting affidavit, heretofore filed herein by the plaintiff, and on the motion for summary judgment, with a supporting affidavit, heretofore filed herein by the defendant, and on the brief and answering brief of the plaintiff, and on the brief and answering brief of the defendant, and there being no genuine issue as to any material fact involved in this case, and the Court being fully advised in the premises, and, under date of August 19, 1948, this Court having issued and filed its memorandum opinion and decision herein:

It Is, Therefore, Adjudged, Ordered and Decreed that the plaintiff's motion for summary judgment for a mandatory injunction commanding the defendant to file the report requested by the Commission's order of September 2, 1947, more fully described in said memorandum opinion and decision, and for judgment against the defendant in the amount of $100 a day for each day from and after April 1, 1948, be and the same hereby is denied; and

95 Be It Further Ordered, Adjudged and Decreed that the defendant's motion for summary judgment that defendant is not liable for the $100 a day penalty be and the same hereby is allowed, and judgment is hereby entered for the defendant and against the plaintiff with respect thereto; and that defendant's motion for summary judgment that it is not liable to file the report requested by the said Commission's order of September 2, 1947, be and the same hereby is allowed, and with respect thereto the complaint herein is dismissed for lack of jurisdiction of this Court.

Enter:

Philip L. Sullivan,
*Judge.*

Dated: August 20, 1948.

96 And afterwards on, to wit, the 15th day of October, 1948, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice of Appeal in words and figures following, to wit:

97 In the United States District Court
For the Northern District of Illinois,
Eastern Division.

United States of America,
*Plaintiff,*
*vs.*
International Salt Company,
*Defendant.*
} No. 48 C 699.

## NOTICE OF APPEAL.

The United States of America, plaintiff-appellant, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the judgment and order of the United States District Court for the Northern District of Illinois, Eastern Division, entered on August 20, 1948, dismissing plaintiff-appellant's complaint.

Otto Kerner, Jr.,
*United States Attorney.*

October —, 1948.

(Attached Hereto Is the Following Certificate:)

98 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

## CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, keeper of the Seal and Records of said Court, do hereby certify that on the 18th day of October, 1948, in accordance with Rule 73 (b) of the Rules of Civil Procedure for District Courts of the United States, I mailed a copy of the foregoing Notice of Appeal to the following attorneys of record:

Ashcraft and Ashcraft
Charles H. G. Kimball
134 S. La Salle Street
Chicago, Illinois

Roy H. Johnson,
*Clerk.*

(Seal)

99 And on the same day, to wit, the 3rd day of November, 1948, came the Plaintiff-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Statement of Points on Appeal in words and figures following, to wit:

100 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-699) * *

## PLAINTIFF-APPELLANT'S STATEMENT OF POINTS ON APPEAL

Comes now the United States of America, plaintiff-appellant in the above-entitled cause, and says that it relies upon the following points in the prosecution of its appeal from the final judgment and order of the United States District Court for the Northern District of Illinois, Eastern Division, entered on August 20, 1948.

1. The District Court erred in holding that this action

was instituted for the purpose of enforcing compliance with a modified order to cease and desist issued by the Federal Trade Commission.

2. The District Court erred in holding that this action was instituted for the purpose of enforcing compliance with a decree of the Court of Appeals for the Seventh Circuit.

3. The District Court erred in holding that the order of the Federal Trade Commission dated September 2, 1947, did not initiate an investigation authorized by subsections (a) and (b) of Section 6 of the Federal Trade Commission Act and by Rule XXVI of the Rules of Practice of the Federal Trade Commission.

101 4. The District Court erred in holding that the supplemental compliance report sought by the Federal Trade Commission through its order dated September 2, 1947, is not the kind of report set out in subsection (a) or subsection (b) of Section 6 of the Federal Trade Commission Act.

5. The District Court erred in holding that the Federal Trade Commission had no authority to investigate compliance with an order to cease and desist issued by the Federal Trade Commission by issuing a special order requiring the defendant to file a special report.

6. The District Court erred in holding that Section 6 of the Federal Trade Commission Act is only to be invoked in support of general economic surveys.

7. The District Court erred in holding that subsection (b) of Section 6 may not be invoked by the Federal Trade Commission in connection with investigations of compliance with orders to cease and desist issued by the Federal Trade Commission against corporations under Section 5 of the Federal Trade Commission Act.

8. The District Court erred in failing to hold that the Federal Trade Commission has the inherent power under Section 5 of the Federal Trade Commission Act to require reports of compliance with orders to cease and desist issued under that section.

9. The District Court erred in holding that the Federal Trade Commission had no authority to promulgate Rule XXVI of its Rules of Practice for the purpose of carrying out the provisions of Section 5 of the Federal Trade Commission Act.

102 10. The District Court erred in stating that it was the position of the Federal Trade Commission "that

Rule XXVI has nothing to do with Section 5 compliance reports, but is only in aid of economic survey reports under Section 6 (b)."

11. The District Court erred in holding that subsection (g) of Section 6 of the Federal Trade Commission Act authorizes the Federal Trade Commission to promulgate rules only for the purpose of carrying out the provisions of Section 6, and does not authorize the Federal Trade Commission to promulgate rules for the purpose of carrying out the provisions of Section 5 and the remaining sections of the said Act.

12. The District Court erred in failing to hold that the Federal Trade Commission has the inherent power to promulgate rules of practice for the purpose of carrying out the provisions of all of the sections of the Federal Trade Commission Act.

13. The District Court erred in holding that Sections 5 and 6 of the Federal Trade Commission Act must be considered separately and that the powers conferred by Section 6 are wholly unrelated to the powers conferred by Section 5.

14. The District Court erred in holding that the only methods of investigating compliance with orders to cease and desist issued by the Federal Trade Commission are by issuing new complaints, by initiating civil penalty proceedings under subsection (1) of Section 5 of the Federal Trade Commission Act, and by initiating contempt proceedings in a court of appeals for violation of decrees affirming and enforcing the said orders to cease and desist.

103 15. The District Court erred in taking into consideration the legislative history of an Act of Congress where the language of the statute is clear and unambiguous and permits only one interpretation.

16. The District Court erred in holding that the legislative history of subsection (b) of Section 6 of the Federal Trade Commission Act indicates that Congress intended that the subsection be invoked only in connection with general economic surveys being conducted by the Federal Trade Commission.

17. The District Court erred in holding that the forfeiture provision of Section 10 of the Federal Trade Commission Act applies only to a failure of corporations to file reports required by the Federal Trade Commission in general economic surveys.

18. The District Court erred in holding that the forfeiture provision of Section 10 of the Federal Trade Commission Act was not applicable to a failure to comply with an order requiring information as to the manner in which an order to cease and desist is being observed.

19. The District Court erred in holding that the forfeiture provision of Section 10 of the Federal Trade Commission Act was not applicable to a failure to attach copies of price lists, freight rate books and terms and conditions of sale to a special report required by the Federal Trade Commission.

20. The District Court erred in holding that it had no jurisdiction to entertain the suit.

21. The District Court erred in entering that final judgment herein.

22. The District Court erred in denying plaintiff's motion for summary judgment.

23. The District Court erred in allowing defendant's motion for summary judgment.

Wherefore, the plaintiff-appellant, the United States of America, prays that the said final judgment in this cause may be reversed, and for such other and further relief as may be just in the premises.

Otto Kerner, Jr.
*United States Attorney*
Chicago, Illinois

John P. Lulinski
*Assistant United States Attorney*
Chicago, Illinois

J. Stephen Doyle, Jr.
*Special Assistant to the Attorney General*
*United States Department of Justice*
Washington, D. C.

Joseph S. Wright
*Assistant General Counsel*
*Federal Trade Commission*
Washington, D. C.

J. B. Truly
*Special Attorney*
*Federal Trade Commission*
Washington, D. C.

105 And afterwards on, to wit, the 3rd day of November, 1948, came the Plaintiff-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Designation of Record on Appeal in words and figures following, to wit:

106 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-699) * *

## DESIGNATION OF RECORD ON APPEAL.

United States of America, plaintiff-appellant, designates the entire record for transmittal on appeal.

Otto Kerner, Jr.,
*United States Attorney.*

November 3, 1948.

107 Northern District of Illinois
Eastern Division } ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation of Record On Appeal filed in this Court in the cause entitled: United States of America, Plaintiff, *vs.* International Salt Company, Defendant, No. 48-C-699, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 10th day of November, 1948.

(Seal)

Roy H. Johnson,
*Clerk.*
By Gizella Butcher,
*Deputy Clerk.*

# UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of the record, filed in this Court on December 30, 1948, in

Cause No. 9754

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

*vs.*

INTERNATIONAL SALT COMPANY, DEFENDANT-APPELLEE

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifteenth day of May, A. D. 1949.

[SEAL] (S.) KENNETH J. CARRICK,
*Clerk of the United States Court of Appeals for the Seventh Circuit*

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the fifth day of October, in the year of our Lord, one thousand, nine hundred and forty-eight, and of our Independence the one hundred-seventy-third.

No. 9754

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

*vs.*

INTERNATIONAL SALT COMPANY, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

And afterward, to-wit, on the eleventh day of March, 1949, the following further proceedings were had and entered of record, to-wit:

# UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

March 11, 1949

Before: Hon. J. Earl Major, Chief Judge

No. 9753

United States of America, plaintiff-appellant,

*vs.*

Morton Salt Company, defendant-appellee

No. 9754

United States of America, plaintiff-appellant,

*vs.*

International Salt Company, defendant-appellee

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

Pursuant to stipulations of counsel, it is ordered:

(1) That the above entitled appeals be consolidated for the purposes of oral argument;

(2) That the plaintiff-appellant be allowed one hour and fifteen minutes for oral argument and the two defendants-appellees be allowed an aggregate of one hour and fifteen minutes for oral argument, with the latter time to be divided between the defendants-appellees as they see fit; and

(3) That the oral argument for the consolidated hearing in these cases be set for Tuesday, April 12, 1949, at 9:30 A. M.

And afterward, to-wit, on the twentieth day of May, 1949, there was filed in the office of the Clerk of this Court the opinion of the Court, which said opinion is in the words and figures following, to-wit:

# IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OCTOBER TERM, 1948, APRIL SESSION, 1949

Nos. 9753-9754

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

*vs.*

MORTON SALT COMPANY, DEFENDANT-APPELLEE

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

*vs.*

INTERNATIONAL SALT COMPANY, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

May 20, 1949

Before MAJOR, *Chief Judge*, MINTON and DUFFY, *Circuit Judges*

MAJOR, *Chief Judge:*

This action was commenced by the United States against numerous defendants, including International Salt Company and Morton Salt Company. From an adverse judgment entered August 20, 1948, the government separately appealed as to these two defendants. Only issues of law are involved in each appeal, and, being identical, they may appropriately be considered and disposed of in a single opinion.

The action, according to the compiaint, was instituted by the Attorney General upon request of the Federal Trade Commission (hereinafter called the Commission) for the enforcement of a Commission order "requiring additional reports of compliance," and to recover forfeitures for failure of defendants to comply with such order. The action is predicated upon Title 15 U.S.C.A. Sec. 49,[1] which vests the several District Courts of the United States with jurisdiction to direct a corporation to comply with an order issued by the Commission, and Sec. 50, which vests any District Court with jurisdiction of suits by the United States for the recovery of for-

[1]Section numbers used in this opinion, unless otherwise noted, refer to the Federal Trade Commission Act, Title 15 U.S.C.A.

feitures if a corporation fails to file any report so required within the time fixed by the Commission.

The order sought to be enforced was issued by the Commission on September 2, 1947, under the authority asserted to reside in Rule XXVI, promulgated by the Commission, and Sec. 46 (a) and (b) of the Act. The complaint sets forth verbatim the order relied upon and the notice of default served on the defendants. There are attached to the complaint numerous exhibits, including a copy of Rule XXVI.

The court below in a well reasoned opinion held that it was without jurisdiction to entertain the cause of action. United States v. Morton Salt Co. and International Salt Co. v. United States, 80 F. Sup. 419. This holding was predicated upon the conclusion that the Commission's order of September 2, 1947, was invalid because issued without authority. It is obvious, so we think, that the right to maintain the instant action is dependent upon the validity of the order.

The issue thus presented calls for a further statement of the factual situation. On September 18, 1940, the Commission issued its complaint under Sec. 45, charging defendants and others with engaging in an unlawful conspiracy to fix prices on and to control the production of salt in connection with the sale and distribution of that commodity in interstate commerce. On November 10, 1941, the Commission issued its order to cease and desist, requiring the defendants to discontinue the conspiracy alleged in the complaint. A petition for review of the Commission's order was filed by the defendants in this court which rendered its opinion March 8, 1943. Salt Producers Association v. Federal Trade Commission, 134 F. 2d 354. On April 20, 1943, this court entered its decree modifying the Commission's order in certain respects, affirming it as modified and directing compliance therewith. In effect, this court by its decree enforced the modified cease and desist order under Sec. 45 and commanded these defendants (as well as the others) to obey said decree, without prejudice to the right of the Commission to initiate contempt proceedings or penalty proceedings under Sec. 45 (l), and it required the defendants to file a compliance report within ninety days and reserved to this court "jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof * * *." Within the time thus designated in the decree of this court, each of the defendants filed a report with the Commission showing the manner and form in which they were complying with the court's decree. In the interim, during a period of more than five years, no question has been raised by the Commission as to the form or content of such compliance reports, and during said period the defendants have not been charged with a violation of the decree of this court and no

request has been made by the Commission that this court order or direct an investigation into defendants' conduct.

The government apparently senses the insecurity of its position if it be held that the order sought to be enforced was in aid of or for the purpose of enforcement either of the decree of this court on the Commission's cease and desist order modified to conform therewith. And so any such purpose on the part of the Commission is disclaimed. There was no attempt, so it is asserted, to enforce either the court's decree or the Commission's order, but "the sole purpose of the order requiring the reports was to inquire as to the manner of compliance by defendants with the Commission's modified order to cease and desist * * and this Court's decree enforcing that order." We have some difficulty in following a theory that the purpose was merely to obtain information as to whether defendants have been violating the decree of this court and at the same time denying that such purpose bears any relation to its enforcement. We are informed that if the defendants are shown to have violated the order of the Commission modified in conformity with the decree of this court, two courses are open, (1) it can certify the facts to the Attorney General under Sec. 56 of the Act, requesting that he file a civil suit seeking civil penalties under the provisions of Sec. 45 (l), or (2) it can petition this court for a rule requiring defendants to show cause why they are not in contempt of court.

We, as the court below, do not agree with the government's contention that the Commission initiated a new investigation. The record plainly discloses that the controverted order was issued in connection with and as a part of the proceeding theretofore had under Sec. 45; in fact, the order itself calls for "an additional and supplemental report showing the manner and form of compliance with the modified order to cease and desist entered by the Commission on August 10, 1943, and with the decree of the Circuit Court of Appeals for the 7th Circuit entered on April 22, 1943." "Additional and supplemental" to what? The answer must be that such reference was to the report of compliance required by the decree of this court and that the order was only a further step in the proceeding of which this court retained jurisdiction. Any doubt in this respect is dispelled by the fact that the order of September 2, 1947, is given the same title and docket number as the Commission's original order dated November 10, 1941.

As already noted, this court retained jurisdiction "to enter such further orders * * as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof." The jurisdictional reservation thus provided was in conformity with Sec. 45 of the Act; in fact, a reading of this section discloses in unmistakable fashion that every vestige of jurisdiction over a proceeding such as that under discussion was definitely

lodged with the Court of Appeals. The court is given the power to enter a decree "affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed," and "the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." It is also provided, "The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari." Not only was the court endowed with jurisdictional power, but by subsection (d) it was provided that such jurisdiction "shall be exclusive."

Thus, with enforcement jurisdiction so firmly and exclusively lodged in a Court of Appeals both by the statute and decree of the court, it would seem that one who asserts such jurisdiction to reside elsewhere is confronted with a heavy burden which can be met only by a rule or statutory provision, which makes clear a legislative purpose to impair or divide the jurisdictional responsibility provided in Sec. 45. Language which only confuses the situation or raises a doubt should not be accepted as sufficient.

An analysis of Sec. 46 furnishes no sound basis for the contention either that it can be utilized as an aid to a proceeding under Sec. 45 or that it was intended to impair or detract from the unambiguous and exclusive jurisdictional provision of that section. Sec. 46, so far as relevant, empowers the Commission in paragraph (a) "To gather and compile information concerning, and to investigate * * the organization, business, conduct, practices, and management of any corporation * * and its relation to other corporations and to individuals, associations and partnerships," and in paragraph (b) "To require, by general or special orders, corporations, * * or any class of them, or any of them * * to file with the commission * * annual or special, or both annual and special, reports or answers in writing to specific questions * *" which will inform the Commission regarding the business affairs of those corporations, and the "relation" thereof "to other corporations, partnerships, and individuals * *."

Not only does the language fail to reveal any interdependence of the two sections, but the opposite is indicated. Sec. 46 is directed solely to a "corporation," while Sec. 45 refers to any "person, partnership or corporation." Also, Sec. 46 is concerned with "annual or special, or both annual and special, reports," while Sec. 45 makes no mention of reports but leaves it to the court to "issue its own order commanding obedience to the terms of such order of the Commission."

Both sides have set forth, particularly with reference to Secs. 45 and 46, a large amount of legislative history, a discussion of which would serve no useful purpose. It can be safely said, however, that such history discloses that Secs. 45 and 46 were not intended as com-

plementary but were designed as separate and distinct, each directed to different situations. The dual purposes embodied in the two sections were recognized in F.T.C. v. Millers' National Federation, 47 F. 2d 428, 429, wherein the court stated: "The power of investigation conferred upon the Commission by section 6 is different in character from the jurisdiction conferred by section 5. Section 6 contemplates an investigation for the collection of facts for the information of Congress in aid of the exercise of its legislative function, or for the President in aid of recommending necessary legislation." See also F.T.C., et al. *v.* Claire Furnace Co., et al., 274 U. S. 160, 170.

The report required by the controverted order, as already noted, calls for "an additional or supplemental report showing the manner and form of compliance," while Sec. 46 is limited to "annual or special reports." In order to bridge this gap we are urged to hold that there is no difference between "an additional or supplemental report" and a "special report." We are not impressed with this reasoning. It seems reasonably plain to us that the term "special report," as used in Sec. 46, means something entirely different and distinct from "an additional or supplemental report showing the manner and form of compliance." This view is strengthened from the fact that Sec. 50, upon which the instant forfeiture action is predicated, provides for recovery for failure to file "any annual or special report * * * within the time fixed by the Commission." It is of significance that this forfeiture section and Sec. 46 characterize the report precisely in the same manner. No forfeiture is provided for failure to file "an additional or supplemental report," as called for by the Commission's order in the instant matter. In fact, reports so designated are not, so far as we are aware, referred to any place in the Act.

Admittedly, the report required by the Commission's order in the instant matter is not an "annual report," and we think it equally plain that it is not a "special report." This view finds support in the House Committee's report on interstate and foreign commerce (Report No. 533, 63rd Congress, 2nd Session), wherein annual and special reports are discussed. The congressional committee stated the purpose in authorizing the Commission to require special reports as follows: "The Commission under this section may also require such special reports as it may deem advisable. By this means, if the ordinary data furnished by a corporation in its annual report does not adequately disclose its organization, financial condition, business practices, or relation to other corporations, there can be obtained by special report such additional information as the Commission may deem necessary." It thus appears that the purpose of the "special report" was to enable the Commission to obtain information which had not been furnished in the "annual report." In other words, the "special report" was intended as additional or

supplemental to the "annual report" but not as additional or supplemental to an order of compliance under Sec. 45.

Irrespective, however, of Sec. 46, the Commission argues that its order is authorized by Rule XXVI. The substance of this rule is contained in two unnumbered paragraphs. The first paragraph requires that a report of compliance be made to the Commission within sixty days (1) after a cease and desist order has been issued by the Commission, or (2) where the parties stipulate to cease and desist. This paragraph contains a proviso as follows: "* * provided, however, that if within the said sixty (60) day period respondent shall file petition for review in a circuit court of appeals, the time for filing report of compliance will begin to run de novo from the final judicial determination * *." We do not understand the government to contend that this paragraph is of any aid to its contention in the instant situation. Obviously, it is not because reports of compliance were made by the defendants within the time fixed by the court. It is interesting to note, however, that this court in its decree fixed ninety days within which the defendants were required to comply rather than the sixty days provided in the rule. It would seem either that the rule was not called to the court's attention or that it was ignored. And we have no doubt that the sixty-day limitation contained in this proviso was not binding upon the court, which had the authority to fix such time for compliance as it saw fit.

The Commission relies upon the second paragraph of the rule, which provides:

> "Within its sound discretion, the Commission may require any respondent upon whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order or with said stipulation."

The scope of this rule appears to depend upon what is meant by "such order * * and any party entering into such stipulation." Does it refer only to an order entered by the Commission and a party entering into a stipulation as provided for in the first paragraph of the rule, or does it include a court decree or an order of the Commission merged therein, as the plaintiff here contends?

The Commission, in support of its authority, relies upon Sec. 46 (g), which provides:

> "From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act."

Thus, two powers are conferred upon the Commission, (1) to classify corporations and (2) to make rules and regulations, and such

powers are joined by the conjunction "and," which would indicate that the latter power is related to the former. As already noted, it is only Sec. 46 which is limited to corporations, while Sec. 45 includes any "person, partnership, or corporation." If the plaintiff's contention be accepted that the Commission is authorized by this provision to promulgate a rule directed to the enforcement of Sec. 45, then the exclusive jurisdiction which that section confers upon courts becomes little more than an empty gesture. We need not labor this point, however, because what we have said concerning Sec. 46 as it relates to Sec. 45 is also pertinent to Rule XXVI. In our view, the authority contained in Sec. 46 (g) must be limited to Sec. 46. Use of language which indicates a broader scope is not difficult to understand because at the time of the insertion of Sec. 46 (g) there was no Sec. 45, and when the latter section was added there was a failure to remove or modify Sec. 46 (g). If the latter section be given the scope urged by the plaintiff, the Commission would have the authority by rule to impair or share the "exclusive jurisdiction" which is expressly conferred upon the courts by Sec. 45.

And it appears that the plaintiff in the lower court placed no such reliance upon this rule as it does here. At any rate, that court (80 F. Sup. 419, 425) stated: "The Commission also insists that Rule XXVI has nothing to do with Section 5 compliance reports, but is only in aid of economic survey reports under Section 6 (b)." The plaintiff here insists that its position was misinterpreted and quotes from its brief in that court. We note, however, the following statement from its quotation: "This rule was promulgated under subsection (g) of Sec. 6 and implements the authority granted the Commission by subsection (b) thereof." In our view, that was the purpose of the rule and the extent of its intendment. We are of the view that it furnishes no support for the controverted order before us.

Plaintiff also argues that the Commission has the inherent power to require reports of compliance with its orders to cease and desist. We need not explore the validity of this argument as it is beside the point. We are not here concerned with the power of the Commission, inherent or otherwise, to enforce its own orders, but with its power to enforce or aid in enforcement of a decree of this court or an order of the Commission which has become merged in a decree of this court. This we think it had on its own initiative no power or authority to do.

The judgment appealed from is affirmed.

MINTON, *Circuit Judge*, dissenting.

A cease and desist order of the Federal Trade Commission that has become final without review or after review by this Court and is not complied with, may result in judgment by a District Court for a civil penalty under 15 U.S.C. Sec. 45(1) or enforcement pro-

ceedings before the reviewing Court of Appeals, 15 U.S.C. Sec. 45, (d). Noncompliance may result in dual action—one, for a penalty before the District Court; two, for enforcement by contempt proceedings by the Court of Appeals; or a choice between the two remedies. Punishment for past delinquencies would seem to lie with the District Court. Enforcement looking to the future would seem to lie with the Court of Appeals. Whether to proceed for punishment or enforcement, or both, would require someone to produce the facts. This is the Commission's job. As I understand the instant proceeding, it is not an attempt at enforcement of this Court's decree by the proceeding here instituted in the District Court, and is therefore by no stretch of imagination an interference with the exclusive jurisdiction of this Court to enforce its orders. The instant proceeding is an attempt by the Commission to get the facts upon which to base a judgment as to whether there has been compliance, which, if present, results in no further proceedings; or noncompliance, which, if present, may lead to action for penalty or enforcement, or possibly both.

Does the Act authorize the Commission to use the procedure it has adopted here to get the facts? We must assume that the Commission is unable to tell from the data furnished whether there has been compliance. Public officers are presumed to act in good faith until the contrary has been made to appear. The Commission finds the authority for the present procedure to obtain the facts under 15 U.S.C. Sec. 46 (a) and (b) and under Rule 26 [1] promulgated by the Commission. It is the position of the Commission that either the rule or the statute is sufficient to justify its action.

It seems to me that when Congress enacted the Federal Trade Commission Act, it was providing an integrated act and not a compartmentalized act, as the majority of this Court seems to think. In my view of the case, it is unnecessary to deal with Sec. 46 (a) and (b) and the narrow, restricted construction thereof, as indulged in by the majority of this Court. I find ample support for the procedure of the Commission contained in its rules, read in conjunction with the provisions of the statute. Sec. 46 (g) of the statute provides:

"Sec. 46. Additional powers of Commission.

"The commission shall also have power—

• • •

"(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of sections 41-46 and 47-58 of this title."

[1] 12 Fed. Reg. 5448, August 12, 1947.

This, it will be noted, is a part of Sec. 46 which the majority of this Court holds applies only to corporations. The section just quoted specifically refers to Secs. 41-46. Sec. 45, which is within this reference, deals with persons, partnerships, and corporations, and the cease and desist order here involved arose out of a Sec. 45 proceeding. It seems clear to me that Congress by Sec. 46 (g) gave a broad power to make rules for the carrying out of the provisions of the whole Act. Under this power, the Commission promulgated Rule 26, the pertinent provisions of which read as follows:

> "In every case where an order to cease and desist is issued by the Commission for the purpose of preventing violations of law and in every instance where the Commission approves and accepts a stipulation in which a party agrees to cease and desist from the unlawful methods, acts or practices involved, the respondents named in such orders and the parties so stipulating shall file with the Commission, within sixty days of the service of such order and within sixty days of the approval of such stipulation, a report, in writing, setting forth in detail the manner and form in which they have complied with said order or with said stipulation; *provided, however*, that if within the said sixty (60) day period respondent shall file petition for review in a circuit court of appeals, the time for filing report of compliance will begin to run de novo from the final judicial determination;
>
> • • •
>
> "Within its sound discretion, the Commission may require any respondent upon whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order or with said stipulation."

We are dealing here with a cease and desist order that has been reviewed by this Court. The rules of the Commission provide that in such a case, the time for filing a report of compliance *begins to run* from the final judicial determination. Nothing is said as to *how long after the time commences to run* the report of compliance shall be filed with the Commission. Apparently the reviewing court's order fixes that time and in the instant case, this Court fixed it at ninety days. Obviously, this rule in no manner interferes with the jurisdiction of this Court to make or enforce its order. Under this rule, whose validity is not challenged here, and which rule has the effect of law, the Commission may require a party to such cease and desist order "to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order."

What the Commission did on September 2, 1947, in the instant case was to require the defendants to file within thirty days after the service of notice additional reports showing in detail the manner and form in which the defendants had been and were complying with the cease and desist order and the decree of this Court, together with some supporting data. On September 22, 1947, the Commission, at the request of one of the respondents in the cease and desist order, but not one of the defendants here, extended the time for filing the additional reports and data to November 1, 1947. The other eighteen respondents in the order complied. Apparently the Commission's procedure did not impress them as unusual. The defendants refused to comply and, being in default for more than thirty days after November 1, 1947, the Commission on February 27, 1948, served notice of default upon the defendants, and, upon their further failure to comply within thirty days, instituted the instant proceeding, pursuant to 15 U.S.C. Sec. 50, which provides:

> "If any corporation required by said sections to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day • • •."

This Sec. 50 refers to "special reports" required by "*said sections*," that is, Secs. 41-46 and 47-58 which are the essential provisions of the Act. True, the Commission's proceedings refer not to "special reports" but to "additional," "further" and "supplemental" reports. It seems to me to say the latter are not special reports is to indulge in a refinement in language that would not be countenanced even in a criminal proceeding. I think "additional," "further" and "supplemental" are the equivalent of "special," since they are all reports not required in the usual course.

The majority have stressed what it sees as an interference with this Court's jurisdiction to enforce its decree. This is a bit unsubstantial, it seems to me. If the facts obtained justify proceedings, the Commission might proceed only for the penalty under Sec. 45 (l). In that instance, the Commission would not have to consult this Court at all. If it sought enforcement it could only be in this Court in full recognition of its jurisdiction.

What this case adds up to is this: That the defendants have refused deliberately, and with full consciousness of the consequences, to comply with an order of the Commission made pursuant to lawful authority, and such deliberate refusal comes squarely within the punitive provisions of Sec. 50. The Commission's rules have been

published in the Code [2] as a part thereof, following 15 U.S.C. Sec. 45 (1946 Edition). Since the regulations, which are authorized by the statute, together with the statute authorized the procedure which the Commission has followed, the defendants have certainly not been misled. I would reverse the judgment of the District Court.

A TRUE COPY:

TESTE:

*Clerk of the United States Court of Appeals for the Seventh Circuit.*

And on the same day, to-wit, on the twentieth day of May, 1949, the following further proceedings were had and entered of record, to-wit:

United States Court of Appeals for the Seventh Circuit

May 20, 1949

Before

HON. J. EARL MAJOR, *Chief Judge,*
HON. SHERMAN MINTON, *Circuit Judge,*
HON. F. RYAN DUFFY, *Circuit Judge.*

No. 9754

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

vs.

INTERNATIONAL SALT COMPANY, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

---

[2] The present rule is Rule 25 in the Code, the same number as in prior publications of the rule in 11 Fed. Reg. 7074-7075, June 26, 1946; 10 Fed. Reg. 7388, June 20, 1945.

United States Court of Appeals for the Seventh Circuit

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of the order of consolidation, opinion of the Court, and Judgment of the Court in Cause No. 9754, United States of America, Plaintiff-Appellant, vs. International Salt Company, Defendant-Appellee, as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifteenth day of July, A. D. 1949.

[SEAL] (S.) KENNETH J. CARRICK,

*Clerk of the United States Court of Appeals for the Seventh Circuit.*

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Supreme Court of the United States

*Order allowing certiorari*

Filed October 24, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas and Mr. Justice Minton took no part in the consideration or decision of this application.

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# In the Supreme Court of the United States

OCTOBER TERM, 1949

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No. —

UNITED STATES OF AMERICA, PETITIONER

*v.*

MORTON SALT COMPANY

---

No. —

UNITED STATES OF AMERICA, PETITIONER

*v.*

INTERNATIONAL SALT COMPANY

---

*PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

The Solicitor General prays that writs of certiorari be issued to review judgments entered by the United States Court of Appeals for the Seventh Circuit affirming judgments of the United States District Court for the Northern District of Illinois, which had dismissed the complaints filed by the United States upon the ground that they sought enforcement of an order of the Federal Trade Commission which it had no statutory authority to issue, and that the district court therefore lacked jurisdiction of the cause.

### OPINIONS BELOW

The opinion of the Court of Appeals (R. 67)[1] is reported in 174 F. 2d 703. The opinion of the district court (R. 47) is reported in 80 F. Supp. 419.

### JURISDICTION

The judgments of the Court of Appeals were entered on May 20, 1949 (R. 77; Int. Salt R. 79). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

### QUESTIONS PRESENTED

1. Whether Section 6(b) of the Federal Trade Commission Act, which authorizes the Federal Trade Commission to require corporations engaged in interstate commerce to file "special" reports furnishing information as to their conduct and practices, empowers the Commission to require such a corporation to file a report as to its compliance with an outstanding order, affirmed by a court judgment, entered in a proceeding under Section 5 of the Act.

2. Whether Section 6(g) of the Federal Trade Commission Act, which authorizes the Commission to make rules and regulations for carrying out the provisions of the Act, empowers the Commission to make regulations providing, not only for filing initial reports on compliance with orders issued

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[1] Since the contents of the records in these companion cases are substantially identical, all record references in this brief, unless otherwise indicated, will be to the record in *United States* v. *Morton Salt Company*.

under Section 5 of the Act, but also for filing at any time thereafter, if the Commission so requires, a further report on compliance.

3. Whether the authority to prevent unfair methods of competition vested in the Commission by Section 5 of the Act empowers it to require a report on compliance with an order issued under that section, independently of any requirement for report embodied in such order.

## STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Federal Trade Commission Act and the Rules of Practice of the Federal Trade Commission are set forth in the Appendix, *infra*, pp. 13-16 .

## STATEMENT

In 1943 the Court of Appeals for the Seventh Circuit entered a judgment enforcing an order issued by the Federal Trade Commission in a proceeding under Section 5 of the Federal Trade Commission Act directed against various salt companies, including the present respondents. *Salt Producers' Association* v. *Federal Trade Commission*, 134 F. 2d 354. The judgment required the salt companies to file within 90 days thereafter a report showing their compliance with the order (R. 18-19), and such a report was filed by the two present respondents (R. 19; Int. Salt R. 17).

In September 1947 the Commission issued an order directing the salt companies to file an "additional and supplemental" compliance report and to

include therein certain specific information as to prices and terms of sale (R. 4-5). The order set forth that it was issued pursuant to Rule 26 of the Commission's Rules of Practice and under the authority granted in subsections (a) and (b) of Section 6 of the Trade Commission Act (R. 4). The respondents failed to file the reports called for by this order and the Commission issued and served notices of default (R. 5-8, 17; Int. Salt R. 5-8, 18). The United States then brought these proceedings to secure enforcement of the Commission's order (R. 2). The suits were based on Sections 9 and 10 of the Trade Commission Act and requested that the court (1) issue a mandatory injunction compelling obedience to the Commission's order and (2) enter judgment against the respondents in the amount of $100 for each day of their default in filing the required compliance report (R. 2-3, 8; Int. Salt R. 2-3, 8).

After the respondents had filed answers admitting the material factual allegations of the complaints (R. 16-17, 21-22; Int. Salt R. 18, 25-26), the United States and both respondents filed motions for summary judgment (R. 23, 39; Int. Salt R. 28, 41-42).

The district court upheld respondents' contention that the reporting requirements of Section 6(b) of the Trade Commission Act are in aid solely of "general economic surveys" authorized by other subsections of Section 6, and that these require-

ments cannot be utilized as an aid to enforcement of the prohibitions of Section 5 of the Act, particularly after an order under Section 5 has been affirmed by a reviewing court (R. 50-55). The court was also of the opinion that if the statute did not otherwise authorize the Commission to require reports on compliance with Section 5 orders, such authority would not be supplied by the power to make rules and regulations for carrying out the provisions of the Act, given by Section 6(g) (R. 55-56). The court accordingly upheld respondents' motions for summary judgment.

The court of appeals likewise was of the view that Sections 5 and 6 were intended to be, not complementary of each other, but "separate and distinct, each directed to different situations" (R. 70-71). The fact that Section 5 orders may be judicially enforced only as provided in that section was believed to require the conclusion that no power conferred upon the Commission by other sections of the Act could be utilized in carrying out its *administrative* duties respecting enforcement of Section 5. The court also held that the power given the Commission to make rules and regulations was limited to the Commission's investigatorial functions under Section 6 of the Act (R. 72-73).

Judge Minton, dissenting (R. 73-77), believed that Congress, when it enacted the statute, provided "an integrated act and not a compartmentalized act."

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred—

1. In holding that the Commission had no authority to issue its order of September 2, 1947, requiring each respondent to file a supplemental report showing the manner of its compliance with an outstanding order of the Commission issued in a proceeding under Section 5 of the Federal Trade Commission Act.

2. In holding that the Commission's order did not come within the authority to require "special" reports given the Commission by Section 6(b) of the Federal Trade Commission Act.

3. In holding that subsections (a) and (b) of Section 6 of the Federal Trade Commission Act do not authorize the Commission to require reports from corporations showing the manner of their compliance with an order to cease and desist issued under Section 5.

4. In holding that Section 6(g) of the Federal Trade Commission Act does not authorize the Commission to make rules for the purpose of carrying out any of the provisions of the Act other than those contained in Section 6.

5. In holding that Rule XXVI of the Commission's Rules of Practice was promulgated without authority of law.

6. In holding that when the Commission required a report on compliance with an order which the Commission had issued in a proceeding under Section 5 of the Act, and which the court had affirmed, such requirement interfered with and

encroached upon the exclusive jurisdiction of the court to enforce its decree affirming the Commission's cease and desist order.

7. In failing to hold that Section 5 of the Federal Trade Commission Act authorizes the Commission to require by order the filing of both original and supplemental compliance reports in connection with orders issued under that section.

8. In affirming the judgments of the district court dismissing the complaints.

REASONS FOR GRANTING THE WRIT

1. We submit that there is no dichotomy, as found by the court below, between the power of the Commission to require reports of corporations, given by Section 6(b) of the Act, and its power to prevent unfair methods of competition conferred by Section 5. While the latter is a self-contained section respecting the procedural provisions for enforcing its prohibitions, it is not self-contained as to the powers which the Commission may exercise in carrying out its administrative functions under that section. In performing these functions, the Commission has made constant and unchallenged use of the power given it by Section 9 of the Act, to examine and to make copies of corporate books and records, and to issue subpoenas compelling the attendance and testimony of witnesses and the production of documents. Thus the Commission, in its administration of Section 5, may draw upon the powers given it by another section of the statute, contrary to the view of the court below that Section 5 confines the Commission to the powers there given. If, under Section 5, the Commission may draw upon some of its general

powers, it would seem that it may draw upon any of them, including those given by Section 6(b).

The language of Section 6(b) does not limit the field as to which reports may be required. The section authorizes the Commission to call for reports furnishing information as to such broad and general matters as the corporation's "conduct," "practices," and "relation to other corporations, partnerships, and individuals."

Long-continued administrative construction, to which the courts attach great weight, supports the view that the Commission, in carrying out its duty to enforce Section 5, may utilize the authority given it by Section 6(b). Some of the earliest orders entered in Section 5 proceedings required a report on compliance with the order and in these early reports Section 6(b) was referred to as the source of authority for such requirement.[2] Since 1920, the Commission has included a requirement for a compliance report in practically every cease and desist order (of which some 3800 have been issued),

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[2] *Federal Trade Commission* v. *Standard Oil Co. of Indiana*, 2 F.T.C. Dec. 26, 38-39 (1920); *Federal Trade Commission* v. *Standard Oil Co. of Indiana*, 2 F.T.C. Dec. 46, 55-56 (1920); *Federal Trade Commission* v. *Sinclair Refining Co.*, 2 F.T.C. Dec. 127, 139 (1919); *Federal Trade Commission* v. *Maloney Oil & Manufacturing Co.*, 2 F.T.C. Dec. 346, 356-357 (1920); *Federal Trade Commission* v. *Galena Signal Oil Co.*, 2 F.T.C. Dec. 446, 460 (1920); *Federal Trade Commission* v. *Lubric Oil Co.*, 3 F.T.C. Dec. 68, 77 (1920).

The Commission at a very early date interpreted Section 6(b) as applicable to prohibitions of the Clayton Act which the Commission has the duty of enforcing. One of the first cease and desist orders issued by the Commission was directed against violation of Section 3 of the Clayton Act. The Commission subsequently issued a further order, which stated that it was based on the authority given by Section 6(b), requiring the corporation to file a report on its compliance with the cease and desist order. *Federal Trade Commission* v. *A. B. Dick Co.*, 1 F.T.C. Dec. 20, 29-30 (1917).

but did not in these later orders make express reference to the statutory basis for this requirement. And the provision in the Commission's Rules of Practice (at present embodied in Rule 26, *infra*, pp. 15-16), that the Commission, in its discretion, may require the filing of supplemental reports on compliance with cease and desist orders which have become final, has been in effect since 1936. *1937 Annual Report of Federal Trade Commission*, 147.

2. We submit that the court below was clearly in error in concluding that, because the statute vests in the reviewing court exclusive jurisdiction to affirm, modify, or set aside orders issued under Section 5, the Commission, following judicial affirmance of such an order, is shorn of all jurisdiction respecting such order. The Commission's duty to enforce Section 5 does not end with entry of a judgment enforcing an order issued thereunder. Since the judgment crystallizes, as to the particular parties involved, the prohibitions of the section, violation of the judgment is a violation of the section. The Commission is therefore under a continuing duty to ascertain whether judgments of enforcement are being obeyed and, if it finds that they are being flouted, to set in motion proceedings to vindicate the court's judgment.[3] To ascertain the facts respecting violation of such judgments "is the Commission's job."[4] Accordingly, all of its general powers which it may exercise in administering Section 5 prior to the entry of a judgment

[3] Such proceedings may be either an application to the court which entered the judgment to adjudge the violator in contempt, or a suit by the United States to recover the penalties for violation provided by subsection (l) of Section 5.

[4] See the dissenting opinion below, R. 74.

of enforcement it may exercise after such a judgment has been entered.

The procedure for enforcement of orders of the National Labor Relations Board is "analogous to that set up by" Section 5 of the Federal Trade Commission Act. *Amalgamated Utility Workers (CIO)* v. *Consolidated Edison Co.*, 309 U. S. 261, 268. Not only is it the duty of the Board to secure vindication of court judgments enforcing its orders, but only the Board is authorized to secure such vindication. *Id.*, p. 269. In the *Amalgamated* case this Court said (269-270):

> Both the order and the decree are aimed at the prevention of the unfair labor practice. If the decree of enforcement is disobeyed, the unfair labor practice is still not prevented. The Board still remains as the sole authority to secure that prevention. The appropriate procedure to that end is to ask the court to punish the violation of its decree as a contempt.

3. We also submit that, independently of Section 6(b), the power and duty of preventing unfair methods of competition imposed upon the Commission by Section 5, as they have been implemented by exercise of the rule-making power given the Commission by Section 6(g), authorize it to require reports on compliance with Section 5 orders. Certainly the Commission is empowered to ascertain whether such orders, after they become final, are obeyed (*supra*, pp. 9-10). There is explicit statutory recognition that the Commission is vested with this power. Section 16 of the Federal Trade Commission Act, 15 U. S. C. 56, provides that whenever the Commission "has reason to believe" that a person or corporation is liable to a penalty

under subsection (l) of Section 5 it shall "certify the facts" to the Attorney General, whose duty it shall be to bring proceedings for enforcement of that section. When Congress authorizes the Commission to "certify the facts" it presumably intended that the Commission should be clothed with authority to ascertain what the facts were.

The Commission has deemed that investigating whether there has been compliance by sending agents to examine books and records is expensive and time consuming and that a compliance report furnishes an effective substitute method for ascertaining the facts. Neither the courts nor the parties concerned have heretofore questioned the propriety of requiring such report when the requirement is embodied in the Section 5 order. In view of the widespread acceptance of this requirement, it would seem that the Commission acted well within the limits of the discretion given it to make rules and regulations for carrying out the provisions of the Act, when it formulated a rule providing not only that an initial report on compliance shall be filed in all cases in which a Section 5 order becomes final, but also that the Commission, in its discretion, may subsequently require a further report on compliance with its order.

4. These cases present an important question of federal law which has not been, but should be, settled by this Court, namely, whether the Federal Trade Commission is authorized to require a corporation, after it has filed an initial report on its compliance with an order issued in a proceeding under Section 5 of the Federal Trade Commission Act, to file a subsequent report on its compliance

with such order. Review by this Court is, we submit, in the public interest for the further reason that the decision below casts some doubt on the validity of rules and practices of the Commission which it deems essential to effective enforcement of the prohibitions of Section 5.

We also submit that insofar as the decision below holds that when a court enters a judgment affirming an order issued under Section 5, the Commission is rendered *functus officio* respecting such order and judgment, the decision is in conflict with the decision of this Court in *Amalgamated Utility Workers (CIO)* v. *Consolidated Edison Co.*, 309 U. S. 261, where a premise of the decision was that the statute there involved was, as to the issue before the Court, analogous to Section 5 of the Federal Trade Commission Act.

## CONCLUSION

It is respectfully submitted that the petition for writs of certiorari should be granted.

PHILIP B. PERLMAN,
*Solicitor General.*

AUGUST, 1949.

APPENDIX

The Federal Trade Commission Act as amended, 38 Stat. 717, 52 Stat. 111, provides in part as follows:

Sec. 5(a). Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. [15 U.S.C. 45(a).]

* * * * *

Sec. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, * * * and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, * * * or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices,

management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. * * * [15 U.S.C. 46(b).]

* * * * *

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act. [15 U.S.C. 46(g).]

* * * * *

Sec. 9. * * *

* * * * *

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof. [15 U.S.C. 49.]

* * * * *

Sec. 10. * * *

* * * * *

If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such de-

fault, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. * * * [15 U.S.C. 50.]

Rule XXVI of the Commission's Rules of Practice, 12 Fed. Reg. 6002, provides in part as follows:

(a) In every case where an order to cease and desist is issued by the Commission for the purpose of preventing violations of law and in every instance where the Commission approves and accepts a stipulation in which a party agrees to cease and desist from the unlawful methods, acts, or practices involved, the respondents named in such orders and the parties so stipulating shall file with the Commission, within sixty days of the service of such order and within sixty days of the approval of such stipulation, a report, in writing, setting forth in detail the manner and form in which they have complied with said order or with said stipulation; provided, however, that if within the said sixty (60) day period respondent shall file petition for review in a circuit court of appeals, the time for filing report of compliance will begin to run de novo from the final judicial determination; * * *.

(b) Within its sound discretion, the Commission may require any respondent upon

whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order or with said stipulation.

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H. Rep. 1142, 63rd Cong., 2d Sess ..... 40
S. Rep. 597, 63rd Cong., 2d Sess ..... 40
S. 4160, 63rd Cong., 2d Sess ..... 40, 42

# In the Supreme Court of the United States

OCTOBER TERM, 1949

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No. 273

UNITED STATES OF AMERICA, PETITIONER

*v.*

MORTON SALT COMPANY

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No. 274

UNITED STATES OF AMERICA, PETITIONER

*v.*

INTERNATIONAL SALT COMPANY

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*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (R. 67)[1] is reported in 174 F. 2d 703. The opinion of the District Court for the

[1] Since the contents of the records in these companion cases are substantially identical, all record references in this brief, unless otherwise indicated, will be to the record in No. 273, *United States* v. *Morton Salt Company*.

Northern District of Illinois (R. 47) is reported in 80 F. Supp. 419.

## JURISDICTION

The judgments of the Court of Appeals were entered on May 20, 1949 (R. 77; No. 274 R. 79). The petition for writs of certiorari was filed on August 17, 1949, and granted on October 24, 1949. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

## QUESTIONS PRESENTED

1. Whether Section 5 (d) of the Federal Trade Commission Act, which gives the courts of appeals "exclusive" jurisdiction to "enforce" orders of the Federal Trade Commission, precludes the Commission from requiring reports of compliance with cease and desist orders which have been affirmed by a court of appeals.

2. Whether the reports which the Federal Trade Commission is empowered to require from corporations, under Section 6 of the Act, are limited to "general economic surveys" to be used as a basis for recommendations to Congress and the President; or whether the Commission can require reports as to compliance with provisions of the Act and with cease and desist orders issued by it in furtherance of its statutory duty to prevent unfair methods of competition.

## STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Federal Trade Commission Act and the Rules of Practice of the Federal Trade Commission are set forth in the Appendix, *infra*, pp. 53–65.

## STATEMENT

These actions were brought by the United States to compel the two respondent corporations to comply with an order of the Federal Trade Commission requiring them[2] to file reports with the Commission, and to recover forfeitures because of respondents' default in filing the reports (R. 2–8). The district court entered judgments dismissing the complaints upon the ground that they sought enforcement of an order of the Commission which it had no authority to issue, and that the court therefore lacked jurisdiction of the suits (R. 57). The Court of Appeals for the Seventh Circuit, with Judge Minton dissenting, affirmed the judgments of the district court (R. 73).

The history of this litigation begins in 1941. On November 10, 1941, the Commission issued a cease and desist order under Section 5 of the Federal Trade Commission Act requiring the respondents, eighteen other salt producers, and a trade association to cease and desist from engag-

[2] This order was directed to respondents, seventeen other salt producers, and a trade association (R. 4–5).

ing in a conspiracy to fix prices of salt and control its production. Upon review, the Court of Appeals for the Seventh Circuit modified and affirmed the order. *Salt Producers Association* v. *Federal Trade Commission*, 134 F. 2d 354. Its decree, entered April 20, 1943, commanded compliance with the modified order and directed that reports of such compliance be filed with the Commission within 90 days (No. 274 R. 22–25). The respondents filed the required reports (R. 28–33; No. 274 R. 32–35).

The court's decree was expressly qualified so as to be "without prejudice to the right of the United States, as provided in Section 5 (l) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violations of the said modified order to cease and desist hereby affirmed, and without prejudice to the right of the Federal Trade Commission to initiate contempt proceedings for violations of this decree" (No. 274 R. 25). The court also reserved jurisdiction "to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof" and "to modify the decree if changed future conditions should warrant such modification" (*ibid.*).

On September 2, 1947, the Commission issued an "order requiring additional reports of compliance from certain respondents", in which it

found that "the public interest required that * * * an additional and supplemental report showing the manner and form of compliance with the modified order to cease and desist entered by the Commission on August 10, 1943, and with the decree of the Circuit Court of Appeals for the 7th Circuit entered on April 22, 1943", be filed by the association and each of the named producers of salt, including the two respondents (R. 4–5). The order recited that it was issued pursuant to Rule XXVI of the Commission's Rules of Practice and pursuant to the authority granted in Section 6 (a) and (b) of the Federal Trade Commission Act (R. 4). Rule XXVI states the Commission's practice of requiring in all cases detailed reports showing the manner and form of compliance with Commission's orders to cease and desist, and its further practice, "within its sound discretion", of requiring further detailed reports from time to time showing the manner and form of compliance with such orders (Appendix, *infra*, pp. 64–65). Section 6 (a) and (b) of the Act empower the Commission to investigate corporations and to require that they file, in such form as the Commission may require, annual or special reports furnishing information as to their "organization, business, conduct, practices, management, and relation to other corporations, partnerships and individuals." (Appendix, *infra*, pp. 58–59.)

The Commission's order specifically required that the reports of the producers of salt contain the following information (R. 5):

> It is Further Ordered that there shall be submitted, as a part of such supplemental reports of compliance, a complete statement on the part of each of the producer respondents named above, of the prices, terms and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements distributed, published or employed in marketing salt from and after January 1, 1944.

The order required that the reports be filed within 30 days after service on respondents (*i. e.*, on or before October 4, 1947); and this time was extended by the Commission to November 1, 1947 (R. 12). However, the two respondents failed to file the required reports. Each respondent wrote to the Commission,[1] merely stating in general terms that it was complying with the Commission's modified order and the court's decree in the manner set forth in the previous report filed in 1943 (R. 21–22; No. 274 R. 25–26). No copies of price lists, terms, or conditions of sale of salt and no copies of freight rate books used in calculating delivered prices of salt were submitted by either respondent.

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[1] Morton Salt's letter was dated October 31, 1947, and International Salt's was dated March 26, 1948.

The Commission issued notices of default and served them on the respondents on March 1, 1948 (R. 6–8, 17; No. 274 R. 6–8, 18). The notices called the attention of each respondent to its failure to file the required report and to the terms of that part of Section 10 of the Act which provides that if a corporation required to file an annual or special report with the Commission fails to do so within thirty days after notice of default, it shall forfeit to the United States $100 "for each and every day of the continuance of such failure" (R. 7; No. 274 R. 7). Respondents made no request for hearings on either the original notices or the notices of default.

After the expiration of the thirty-day period, the required reports not having been filed, the United States brought the present suits in the district court to secure enforcement of the Commission's order.* The complaints were based on Sections 9 and 10 of the Act (Appendix, *infra*,

*The Court of Appeals mistakenly stated in the opening paragraph of its opinion that action was commenced in the district court against numerous defendants, including the two respondents (R. 67). The only actions filed in the district court were the two now under consideration by this Court in this proceeding. Action against the Association and certain other named producers of salt was unnecessary because, as shown by the official records of the Commission, reports complying with the Commission's order of September 2, 1947, were filed by the Association and by or on behalf of ten producers of salt. (See also R. 40.) As to these corporations, notices of default similar to those served upon the two respondents were vacated by order of the Commission.

pp. 60–63) and prayed that the court (1) issue mandatory injunctions commanding respondents to file the reports required by the Commission's order of September 2, 1947, and (2) enter judgment against each respondent in the amount of $100 for each day of its default in filing the required report (R. 2–3, 8; No. 274 R. 2–3, 8).

The respondents filed answers admitting the material factual allegations of the complaints (R. 16–17, 21–22; No. 274 R. 18, 25–26); and since, as the district court found (R. 47), there was no dispute between the parties as to the material facts, the United States and both respondents filed motions for summary judgment (R. 23, 39; No. 274 R. 28, 41–42). The court granted respondents' motions and dismissed the complaints for want of jurisdiction (R. 57; No. 274 R. 61), and the Court of Appeals affirmed, Judge Minton dissenting (R. 73).

## SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred—

1. In holding that the Commission had no authority to issue its order of September 2, 1947, requiring each respondent to file a supplemental report showing the manner of its compliance with an outstanding order of the Commission issued in a proceeding under Section 5 of the Federal Trade Commission Act.

2. In holding that the Commission's order did not come within the authority to require "spe-

cial" reports given the Commission by Section 6(b) of the Federal Trade Commission Act.

3. In holding that subsections (a) and (b) of Section 6 of the Federal Trade Commission Act do not authorize the Commission to require reports from corporations showing the manner of their compliance with an order to cease and desist issued under Section 5.

4. In holding that Section 6 (g) of the Federal Trade Commission Act does not authorize the Commission to make rules for the purpose of carrying out any of the provisions of the Act other than those contained in Section 6.

5. In holding that Rule XXVI of the Commission's Rules of Practice was promulgated without authority of law.

6. In holding that when the Commission required a report on compliance with an order which the Commission had issued in a proceeding under Section 5 of the Act, and which the court had affirmed, such requirement interfered with and encroached upon the exclusive jurisdiction of the court to enforce its decree affirming the Commission's cease and desist order.

7. In failing to hold that Section 5 of the Federal Trade Commission Act authorizes the Commission to require by order the filing of both original and supplemental compliance reports in connection with orders issued under that section.

8. In affirming the judgments of the district court dismissing the complaints.

## SUMMARY OF ARGUMENT

### I

The action of the Federal Trade Commission in requiring a supplemental report of compliance with a cease and desist order in no way impairs the jurisdiction of the court of appeals but is complementary to it. The Federal Trade Commission Act requires the collaboration of the Commission and the courts to achieve the purposes of the Act. The Commission has the continuing duty to prevent unfair methods of competition and that duty is not fully discharged with respect to a particular violator when a cease and desist order is entered and judicially affirmed. The Commission has the investigative or police duty to collect information as to violations of its orders with a view to enforcement through contempt proceedings in the court of appeals or action by the United States for civil penalties in the district court. Far from being an interference with the jurisdiction of the courts, the order requiring supplemental compliance reports is an essential preliminary step in the vindication of that jurisdiction.

### II

The Commission is specifically empowered to require "special" reports from corporations engaged in commerce, and a supplemental report of compliance with a cease and desist order is plainly

a special report whether or not it is in terms so denominated. The language of the statute clearly supports the power of the Commission to require compliance reports in aid of its duty to prevent unfair competition. There is no support in the statute or its legislative history for the contention that the power to require reports is available only for the purpose of making general economic surveys. On the contrary, both the legislative history and consistent, long continued administrative construction reinforce the view that the Commission's report-requiring power authorizes it to gather facts bearing on compliance with the Act and with orders issued under it.

Independently of its power under Section 6 (b) to require special reports, the Commission can require compliance reports in aid of its power to issue cease and desist orders and by virtue of a specific valid rule providing for such reports.

## ARGUMENT

### *Introductory Analysis*

The decision below rests upon the following two propositions of law, both of which are demonstrably erroneous:

(1) The Commission's authority, under Section 6 of the Federal Trade Commission Act, to require annual and special reports from corporations subject to the Act is limited to so-called "general economic surveys" on the basis of which it can make

recommendations to Congress and the President; the Commission is not empowered to require reports from corporations in order to ascertain whether they are complying with the Act or with its orders; the authority to require reports, as the district court put it, "is not related in any way to the enforcement of the law" (R. 52), and the Commission exceeds its statutory powers where, as here, it seeks to elicit information from particular corporations as to the extent of their compliance with an earlier order requiring them to cease and desist from specified acts and practices found to be unfair methods of competition.

(2) Even if the Act is construed to empower the Commission to require reports of compliance with its cease and desist orders, that power disappears wherever a petition for review is filed with a court of appeals and, on such review, the Commission's order is affirmed; in such cases the court of appeals retains "exclusive" jurisdiction to "enforce" its decree of affirmance, into which the Commission's order becomes "merged," and it is an unlawful interference with the court's jurisdiction for the Commission to require reports from the parties as to the facts bearing upon compliance or noncompliance with the order and decree.

We shall analyze both of these propositions in detail, and show that they are clearly and affirmatively refuted by the language, purposes, legisla-

tive history, and administrative interpretation of the Act, and that their practical implications are destructive of the proper functions assigned by Congress to the Commission and the courts of appeals in order harmoniously to effectuate the statutory policies.

The decision below, to the extent that it places a general limitation upon the Commission's powers to gather facts bearing on compliance with the Act, unjustifiably handicaps the Commission in carrying out the mandate given it by Congress to prevent unfair methods of competition, and unfair or deceptive acts or practices in interstate commerce. And, to the extent that it holds that the "exclusive" jurisdiction of a court of appeals to "enforce" its decree necessarily precludes the Commission from securing reports and information which it could otherwise obtain, the decision below (a) prevents the Commission from performing the preliminary fact-gathering function which only it can properly discharge and which no court of appeals could or should assume, and (b) encourages even the most flagrant violator of the Act to seek court review, and thereby gain the substantial advantage of disabling the Commission from subsequently securing information as to compliance with the cease and desist order. The decision below thus would have the effect of offering an incentive for otherwise fruitless litigation; and those who have been found guilty of violating the Act and have been ordered to

cease and desist from continuing in such violation (and whose future activities therefore should bear particularly close scrutiny by the Commission) could disarm the Commission of one of its most effective investigative weapons, simply by seeking court review of the Commission's order.

As has been indicated, the issues raised by this case involve the respective statutory functions of the Federal Trade Commission and the courts in the administration of the Federal Trade Commission Act. To place those issues in perspective it is necessary to consider the scheme of the Act in some detail.

The primary responsibility and duty of the Federal Trade Commission is "to prevent persons, partnerships, or corporations [with certain exceptions] * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce" (Section 5 (a), Appendix, *infra*, p. 53). To carry out this large task, the Act gives the Commission broad powers and directions. When the Commission has "reason to believe" that unfair methods of competition have been or are being used, it is required to hold hearings to determine the facts; and if it concludes that the Act has been violated, it must issue a cease and desist order to prevent future violations (Section 5 (b)).

In addition to its primary duty to police methods of competition in commerce, the Commission has certain other duties and powers—e. g., to

investigate compliance with final decrees in antitrust suits on its own initiative or when requested to do so by the Attorney General (Section 6 (c)); to investigate alleged violations of antitrust statutes when directed by the President or Congress (Section 6 (d)); and to act as a master in chancery in antitrust suits where directed by a court (Section 7).

Apart from the inherent power to gather such information as will enable it to carry out its functions, the statute gives the Commission a number of specific powers to aid in that task. Thus the Commission explicitly is endowed with power to "gather and compile information concerning" and "to investigate from time to time the organization, business, conduct, practices, and management" of any corporation subject to the Act (Section 6 (a) Appendix, *infra*, p. 58); it can require such corporations, or "any class of them," or "any of them," to file "annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing" (Section 6 (b), Appendix *infra*, pp. 58–59); it can issue subpoenas, take testimony, inspect books and require production of documentary evidence (Section 9); and it is au-

thorized to "make rules and regulations for the purpose of carrying out the provisions of this Act" (Section 6 (g), Appendix, *infra*, p. 60).

The statutory scheme for enforcement of the Commission's orders and imposition of sanctions for their violation is somewhat complex. A Commission cease and desist order under Section 5 is subject to review by a court of appeals, if a petition for review is filed within sixty days (Section 5 (c) ). On such review, the jurisdiction of the court of appeals to "affirm, enforce, modify, or set aside" the Commission's order is "exclusive" (Section 5 (d), Appendix, *infra*, p. 57). If no petition for review is filed in the court within the prescribed time, the Commission's order becomes "final" (Section 5 (g) (1), Appendix, *infra*, p. 57). A Commission order which is taken to court becomes "final" upon completion of the process of judicial review (Section 5 (g) (2) *et seq.*). Whenever the Commission has reason to believe that a violation of a final cease and desist order has occurred, Section 16 provides that it shall certify the facts to the Attorney General, whose duty it becomes to bring an action, in the name of the United States, for civil penalties (Section 5 (l)).

The statute does not in express terms provide for enforcement through contempt proceedings in the courts of appeals. Section 5 (c) merely states: "To the extent that the order of the

Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Decrees affirming Commission orders customarily provide, as in this case (No. 274, R. 25), for enforcement through contempt proceedings to be initiated by the Commission, and such procedure is usually followed by the Commission where it possesses facts showing violation of the decree. But, as pointed out above (and as was recognized in the instant decree (*ibid.*)), the Act also provides for punishing violations of Commission orders, even where they have become final through affirmance by a court of appeals, by civil actions for penalties, to be brought by the Attorney General, at the instance of the Commission (Sections 9 (1) and 16).

The district courts are also vested with jurisdiction to issue writs of mandamus to compel compliance with the Act or any order issued by the Commission (Section 9), and to impose civil and criminal penalties for disobedience of Commission orders (Section 10). In particular, the third paragraph of Section 10 expressly provides that a corporation failing to file any annual or special report required by the Commission shall forfeit to the United States the sum of $100 for each day of the continuance of such failure, and that these penalties shall be enforceable in a civil suit brought by the United States in a district court (Appendix, *infra*, p. 63).

From the above review of the relevant statutory provisions, it is apparent that: (1) While one provision of the Act states that the jurisdiction of the courts of appeals to "enforce" Commission orders is "exclusive" (Section 5 (d)), this cannot be taken literally because other provisions of the Act expressly vest the district courts with jurisdiction to issue writs of mandamus, to impose fines and penalties, and to take other action for the purpose of compelling obedience to Commission orders. (2) Congress plainly contemplated that the Commission should be the investigative agency empowered to police the Act and orders issued thereunder, and it therefore explicitly gave the Commission broad powers for obtaining information and gathering facts for the purpose of ascertaining whether particular companies subject to the Act are complying with its provisions and with Commission orders.

## I

### THE "EXCLUSIVE" JURISDICTION OF THE COURTS OF APPEALS TO "ENFORCE" FEDERAL TRADE COMMISSION ORDERS DOES NOT DEPRIVE THE COMMISSION OF THE DUTY AND POWER TO REQUIRE REPORTS FOR THE PURPOSE OF ASCERTAINING WHETHER ITS CEASE AND DESIST ORDERS ARE BEING OBEYED

The basic question presented by this case is whether the entry of a decree by a court of appeals enforcing a cease and desist order immunizes the respondent from further investiga-

tive action by the Commission to determine whether compliance is being given to the cease and desist order. Or, putting it in different words, the issue is whether the Commission's statutory duty to "prevent * * * unfair methods of competition" (Section 5 (a)) comes to an end with respect to a particular violator when a cease and desist order (which, in its very nature, necessarily looks to the future) is affirmed by the reviewing court.

The court below thought that the short and complete answer to this question is found in Section 5 (d), which provides that the jurisdiction of a court of appeals to "affirm, *enforce*, modify, or set aside orders of the Commission shall be *exclusive*." [Italics added.] In rejecting the contention that the fact-gathering power asserted by the Commission in this case complements, rather than interferes with, the jurisdiction reserved to the court of appeals, the court said:

> We are not here concerned with the power of the Commission, inherent or otherwise, to enforce its own orders, but with its power to enforce *or aid in enforcement* of a decree of this court or an order of the Commission which has become merged in a decree of this court. This we think it had on its own initiative no power or authority to do. [R. 73; italics added.]

To say that the court of appeals has "exclusive" jurisdiction to "enforce" its decree is, we submit, to begin rather than to end the inquiry. The proper meaning of these two words, "exclusive" and "enforce", as used in the Act, is crucial here. And the sense in which Congress used these words in Section 5 (d) is by no means as obvious or precise as the court below thought. Thus, the word "enforce" has an intrinsic ambiguity. A judge and a policeman both "enforce" the law—but not in the same sense of the word. A policeman's obligation to "enforce" the law requires that he *investigate* the facts, check complaints, verify suspicions, and perform the other duties necessary to ascertain whether the law is being obeyed. If he has reason to believe that a violation of law has occurred, the policeman presents the matter to the judge—whose duty to "enforce" the law consists of *deciding* the issue of guilt or innocence and of imposing such punishment as the circumstances may warrant.

The judge's "exclusive" authority to carry out his duty of "enforcing" the law has never been understood as relieving the policeman of *his* duty. And the question here presented is whether Congress intended a different rule to apply under the Federal Trade Commission Act wherever a cease and desist order has been taken to court and a decree of affirmance entered. The issue is whether Congress intended to place the function and re-

sponsibility for enforcement, in every sense of the term, exclusively on the courts of appeals, and to divest the Commission of its duty and power to gather facts and information bearing on compliance, simply because of the circumstance that a court decree has been entered. To state this question is to answer it. If Congress had intended so drastically to alter the customary roles of administrative agency and reviewing court, one would expect to find some clear indication to that effect in the terms or legislative history of the statute. But, as we shall show, the contrary is true. The statute clearly reflects a legislative purpose that the Commission and the courts of appeals shall act as collaborators in enforcing the provisions of the Act; each has its own responsibility in its proper sphere; and the respective functions of each are not in conflict with, but rather are indispensable to, one another in the large task of effectuating the public interest protected by the Act. The Commission is the investigative agency, and the court is the adjudicative body; and neither can or should undertake the other's functions.

Under the Federal Trade Commission Act, as originally enacted in 1914 (38 Stat. 717), Commission orders were not self-executing, and a decree of a court of appeals was required in order to give any legal effect to a cease and desist order issued by the Commission. *Federal Trade*

*Commission* v. *Balme*, 23 F. 2d 615 (C. A. 2), certiorari denied, 277 U. S. 598; *Federal Trade Commission* v. *Standard Educational Society*, 86 F. 2d 692 (C. A. 2). The statute could at that time be accurately described, therefore, as providing that the court's jurisdiction over cease and desist orders was "exclusive" in the sense that only a court of appeals could compel compliance with them. The exclusive nature of the court of appeals' jurisdiction was changed, however, by certain amendments to the Act made in 1938 (52 Stat. 114). Congress provided that Commission's orders would become final and effective of their own force unless review was sought in a court of appeals within the allowed period (Section 5 (g)). In addition, the Commission was explicitly vested with primary responsibility for enforcing the penalty provisions of Section 5 (l). Section 16 of the Act, also added in 1938, provides that whenever the Commission "has reason to believe" that a person or corporation is liable to a penalty under Section 5 (l), it shall "certify the facts" to the Attorney General, whose duty it shall be to bring proceedings for enforcement of that section. In thus authorizing the Commission to "certify the facts" to the Attorney General, Congress must have intended that the Commission should be clothed with authority to ascertain what the facts were. Accordingly, to the extent that the imposition of penalties for past violations is a sanction aimed at future enforcement of an order,

Section 5 (l) shows that the court of appeals' enforcement jurisdiction is not exclusive: The Commission in seeking, and the district court in awarding, penalties are, in substance and effect, engaged in "enforcing" the order.

In the court below the respondents advanced the suggestion that the penalty provision contained in Section 5 (l) was intended to apply only to violations of orders of which court review had not been sought. This contention finds no support in the language of the provision,* its legislative history, or in the cases arising under it. *Cf. United States* v. *Standard Educ. Soc.*, 55 F. Supp. 189 (N. D. Ill.). Section 5 (l) applies to every cease and desist order which "has become final"; and Section 5 (g) (2) expressly provides that an order which has been affirmed becomes "final" upon the expiration of the time allowed for filing a petition for certiorari, if no petition has been seasonably filed. Clearly it would not seem reasonable to attribute to Congress an intention to eliminate the civil penalties whenever a Commission order has been held lawful by a court of appeals. Moreover, the argument is contra-

*"Any person, partnership, or corporation, who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

dicted by the very terms of the decree of the court below affirming the cease and desist order against the respondents. As has been noted, that decree was explicitly made "without prejudice to the right of the United States, as provided in Section 5 (l) * * * to prosecute suits to recover civil penalties for violations of the said modified order to cease and desist hereby affirmed * * *" (No. 274 R. 25).

It is clear, therefore as Judge Minton pointed out in his dissenting opinion (R. 73–74), that noncompliance with a Commission cease and desist order which has become final may lead to two types of judicial proceedings: (1) in the court of appeals, for contempt; and (2) in the district court, for recovery of civil penalties. "Punishment for past delinquencies," Judge Minton stated (R. 74), "would seem to be with the District Court. Enforcement looking to the future would seem to lie with the Court of Appeals. Whether to proceed for punishment or enforcement, or both, would require someone to produce the facts. This is the Commission's job. As I understand the instant proceeding, it is not an attempt at enforcement of this Court's decree by the proceeding here instituted in the District Court, and is therefore by no stretch of imagination an interference with the exclusive jurisdiction of this Court to enforce its orders. The instant proceeding is *an attempt by the Commission to get the*

*facts upon which to base a judgment* as to whether there has been compliance, which, if present, results in no further proceedings; or noncompliance, which, if present, may lead to action for penalty or enforcement, or possibly both." [Italics added.]

The Federal Trade Commission Act empowers and directs the Commission to prevent corporations from using unfair methods of competition in commerce (Section 5 (a)). Since the judgment of the court of appeals crystallizes, as to the particular parties involved, the prohibitions of the section, violation of the judgment is a violation of the Act. The Commission is therefore under a continuing duty to ascertain the facts as to whether judgments of enforcement are being obeyed and, if it finds that they are being flouted, to set in motion proceedings to vindicate the court's judgment.

The entry of a court decree does not relieve the Commission of its statutory duties. Cf. *American Chain and Cable Company* v. *Federal Trade Commission*, 142 F. 2d 909 (C. A. 4). If it did, a court decree affirming a cease and desist order would, by its removal of the Commission from the picture, be an invitation to violation of the order. For it is obvious that the courts of appeals have no machinery or personnel for checking on compliance with their decrees. They must, perforce, rely upon interested parties to complain of violations of decrees by other parties. The Commission under this Act, as the National Labor

Relations Board under its Act, is the agency whose function it is to vindicate the court's decrees." In *Amalgamated Utility Workers (CIO) v. Consolidated Edison Co.*, 309 U. S. 261, 268, the Court noted that the procedure for enforcement of orders of the Labor Board is "analogous to that set up by the Federal Trade Commission Act", and it went on to hold that not only is the Board under a duty to secure vindication of court decrees enforcing its orders, but the Board is the *only* agency authorized to secure such vindication (pp. 269–270):

> It is the Board's order on behalf of the public that the court enforces. It is the Board's right to make that order that the court sustains. The Board seeks enforcement as a public agent, not to give effect to a "private administrative remedy". Both the order and the decree are aimed at the prevention of the unfair labor practice. If the decree of enforcement is disobeyed, the unfair labor practice is still not prevented. The Board still remains as the sole authority to secure that prevention.

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* It is significant that the statute specifically gives the Commission the power, on its own initiative, to investigate the extent to which antitrust decrees are being carried out (Section 6 (c)). It seems incongruous that Congress would permit the Commission thus to "impair" the jurisdiction of courts rendering antitrust decrees to which the Commission is not a party, and yet deny it the power even to aid in the enforcement of its own orders.

The principle of the *Amalgamated* case was followed by the court below in *J. Greenebaum Tanning Co.* v. *National Labor Relations Board*, 129 F. 2d 487 (C. A. 7). In that case the employer filed a petition requesting the court of appeals to construe its decree affirming a Board order, and asking that it be advised whether its conduct constituted compliance with that decree. In refusing to grant the petition, the court, in an opinion by Judge Major, said (p. 489):

> * * * the Act contemplates the Board, and it alone, as the agency empowered to investigate, prefer charges when and if it sees fit, and to carry on the prosecution of such charges. That this is so *after decree*, as well as before, was decided in *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261 * * *. [Italics added.]

In expressly reserving jurisdiction, in its decree of affirmance, to enter orders necessary to enforce compliance or to modify the decree if changed conditions should warrant, the court of appeals was merely making explicit a power which it inherently possessed. *Michaelson* v. *United States*, 266 U. S. 42, 65–66. The basic principle was expressed by Mr. Justice Cardozo in *United States* v. *Swift & Co.*, 286 U. S. 106, 114, as follows:

> Power to modify the decree was reserved by its very terms, and so from the begin-

> ning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. [Citations.]

To hold that a court's jurisdiction to enforce or modify a decree is usurped by an agency order seeking only to elicit information as a basis upon which to determine whether it is necessary to invoke the court's jurisdiction is, in our view, to ignore the admonition of this Court (*United States v. Morgan*, 307 U. S. 183, 191) that:

> * * * in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action.

And see *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 15: "Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest. * * * Both are instruments for realizing public purposes." Accord: *Hecht Co.* v. *Bowles*, 321 U. S. 321, 330.

The district court in this case expressed agreement with the view that, "notwithstanding the reservation of jurisdiction by the Circuit Court of Appeals in its decree, the Commission may investigate any violations which it has reason to believe defendants are committing" (R. 55). But, the court continued (*ibid.*), "In order to accomplish this the Commission may file a new complaint against defendants, alleging in what manner it considers that defendants are violating the Act. Or penalty proceedings under Section 5 (l) may be initiated by the United States for alleged violations of the former decree in the Circuit Court of Appeals. Or contempt proceedings may be brought in the Circuit Court of Appeals."

Obviously, however, the alternatives suggested by the district court are available to the Commission *after*, and *not before*, it has completed an investigation and is in possession of facts showing violation of the cease and desist order. The question here presented arises only where the Commission has not yet obtained such facts, and seeks to obtain them as a basis for further action.

Under Section 5 of the Act, the Commission cannot issue a complaint unless it has "reason to believe" that a violation of law has occurred. And, under Section 16, the Commission must have "reason to believe" that a party is liable to a penalty before it can "certify the facts" to the Attorney General for appropriate action under Section 5 (l). These provisions clearly show that Congress contemplated that proceedings under these sections, as well as contempt proceedings in a court of appeals, should be instituted after the Commission's investigation of the facts, and that it was not intended that such proceedings should be started by the Commission as a substitute for making the necessary investigations.——

*Mine Workers* v. *Eagle-Picher Co.*, 325 U. S. 335, does not support the holding below. The question in that case, as stated by the Court (p. 336), was whether the Labor Board, after obtaining a court decree enforcing its own order, is entitled, in the absence of fraud or mistake induced by the employer, to have the remedial portion of the decree set aside and the cause remanded to it for reconsideration. In the present case the Commission sought neither to rescind nor to modify the court's decree. It sought only to obtain facts from the parties as to the extent of their compliance with the decree and order. Unlike *Eagle-Picher*, no claim can properly be made here that the Commission's action constituted an interference with the court's exclusive

jurisdiction over its own decree. Indeed, Mr. Justice Roberts' opinion for the Court in that case appears to approve the holding in *American Chain & Cable Co.* v. *Federal Trade Commission*, 142 F. 2d 909 (C. A. 4), that the Commission's power to modify its orders after they become final, where changed conditions in the public interest require (Section 5 (b)), extends also "to cases where its order had become final by court decree as well as to cases where the order had become final by failure to appeal" (p. 342). In this case the Commission is not asserting a power to modify its earlier cease and desist order. But if, as the Court apparently held in *Eagle-Picher*, the Commission possesses power to make such modification as changed conditions in the public interest require, it would follow, *a fortiori*, that its possesses the lesser power of gathering facts and information on the basis of which it can make an informed exercise of its authority.

Despite the rather extreme holding of the court below that the Commission "on its own initiative" has no power or authority "to enforce *or aid in enforcement* of a decree of this court" (R. 73; italics added), we assume that the court would scarcely deny to the Commission the right to seek from it a contempt order against the respondents for violation of the decree. But the order which the court below has struck down as interfering with its exclusive jurisdiction was

an order designed to elicit facts from which the Commission could ascertain whether there was "reason to believe" that the decree had been violated. Thus the court would cripple the investigative powers of the Commission which are essential to the effective exercise of the administrative function of discovering violations of the decree, and hence ultimately essential to the vindication of the court's own jurisdiction.

It is no answer to suggest that the Commission should seek permission from the court before using its investigative powers. There is no statutory basis for such a suggestion. Moreover, the imposition of such an unwarranted burden upon the Commission and the courts could only be justified if violators of the law who have been ordered to cease and desist from such violation were entitled to special protection against the Commission not accorded to corporations which have not violated the law. The inequity of such a result is too obvious to require argument.

For the reasons above stated we think it clear that there is no warrant in the statutory scheme, or in the term "exclusive jurisdiction", for the novel and impractical restrictions placed upon the Commission's investigative activities by the court below. In Point II, *infra*, we shall show that the Act and its legislative history affirmatively demonstrate an intention that the Commission should have the very fact-gathering powers here denied it.

## II

### THE COMMISSION IS EMPOWERED TO REQUIRE REPORTS OF COMPLIANCE WITH ITS CEASE AND DESIST ORDERS

In addition to the contention discussed in Point I, *supra*, that the Commission's requirement of compliance reports constitutes an interference with the jurisdiction of the courts of appeals, it is contended by respondents and was held below that there is no affirmative authority for such a requirement. We think it clear that to reach such a result it is necessary to depart from the explicit language of the statute and to disregard its legislative history and consistent administrative interpretation.

#### a. *Section 6 (b) of the Act empowers the Commission to require corporations to file annual or special reports furnishing information as to their business, conduct, and practices*

Section 6 (b) in terms authorizes the Commission

> To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe *annual or special, or both annual and special, reports* or answers in writing to specific questions, furnishing to the commission such information as it may require as to the

> organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. * * * [Italics added.]

It is hard to see how the broad power to require "special" reports can be thought to exclude compliance reports. It is contended that the failure of the Commission to denominate the required report as "special" is a fatal bar to the validity of its order. Shakespeare to the contrary notwithstanding, the court below held that a special report is not a special report unless it is so labeled. In addition to this insistence that nomenclature, and not substance, is controlling, the court below relied on a House Committee report (H. Rep. No. 533, 63rd Cong., 2d Sess., p. 4) which stated:

> *The commission, under this section, may also require such special reports as it may deem advisable.* By this means, if the ordinary data furnished by a corporation in its annual reports does not adequately disclose its organization, financial condition, business practices, or relation to other corporations, there can be obtained by a special report such additional information as the commission may deem necessary. [Italics added.]

It is evident that this description of the Commission's power to order special reports furnishes no support for the court's conclusion (R. 71–72)

that the only kind of "special report" which the Commission can require is one which is "additional or supplemental to the 'annual report' ". But, in any event, Section 6 (b) does not provide that "annual reports" should not contain information bearing on compliance with the Act or Commission orders. On the contrary, the section gives the Commission power to require comprehensive information as to a company's "organization, business, conduct, practices, management, and relation to other corporations". Consequently, even if the Committee's description of "special reports" were to be construed as the court below suggested, the result would merely be to invite the Commission to require annual compliance reports, not to render it powerless to call for compliance reports at all.

Besides holding that a supplemental report of compliance is not a "special" report and therefore not authorized by Section 6, the court below held that the Commission's powers under Section 6 of the Act cannot be used in aid of its general enforcement powers under Section 5. In reaching this conclusion, the court relied (R. 72) upon (1) the failure of the language of the two sections "to reveal any interdependence"; (2) the fact that Section 6 is "directed solely to a 'corporation' " while Section 5 "refers to any 'person, partnership or corporation' "; and (3) the fact that only Section 6 expressly provides for reports to the Commission, and Section 5 contains

no mention of reports but leaves it to the court of appeals to issue its own order commanding obedience to the terms of the Commission's order.

The insubstantiality of all of these grounds is readily demonstrable. It is wholly artificial to regard the power given the Commission in Section 6 (a) to "investigate * * * the * * * business, conduct, practices, and management" of any corporation as unrelated to its power and duty under Section 5 (a) to "prevent * * * corporations * * * from using unfair methods of competition." As Judge Minton pointed out below, "when Congress enacted the Federal Trade Commission Act, it was providing an integrated act and not a compartmentalized Act" (R. 74). The power to investigate is intrinsically complementary to the power to take action upon the results of investigation. And to say that Section 6 (g), which empowers the Commission "to make rules and regulations for the purpose of carrying out the provisions of this Act", has no application to Section 5 is to say that when Congress used the words "this Act", it really meant "this Act except Section 5".

The court's reliance upon the fact that Section 5 is broader in its application than Section 6—i. e., that it applies to persons and partnerships as well as corporations—is likewise unjustified. In the first place, Section 6 is not limited to corporations in the rule-making provision above-quoted.

And, secondly, the limitation of reporting requirements to corporations must be viewed in the light of the constitutional limitations which Congress deemed applicable to the requirement of reports from individuals.[1]

Nor does the failure of Section 5 to mention reports in connection with enforcement of cease and desist orders show that Section 6 (b) does not encompass compliance reports. This argument, like the others, rests on the premise that Section 5 is a self-contained unit intended to stand alone, and that the Commission's powers under Section 5 to prevent unfair methods of competition are limited to those expressly or impliedly contained therein. In other words, so far as proceedings under Section 5 are concerned, this argument would deprive the Commission not only of its power to gather and compile information and to investigate corporate conduct and practices (Section 6 (a)) and to require annual and special reports (Section 6 (b)), but also its power to "make rules and regulations for the purpose of carrying out the provisions of this Act" (Section 6 (g)) and to issue subpoenas, inspect documents, etc. (Section 9). The patent absurdity of this argument makes lengthy refutation unnecessary.

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[1] See the discussion of the constitutionality of such provisions in the legislative history, *infra*, p. 43.

In reaching its conclusion that Sections 5 and 6 "were not intended as complementary but were designed as separate and distinct, each directed to different situations" (R. 70-71), the court was forced to disregard both the consistent long-standing administrative construction and the legislative history of the Act. It relied solely on a dictum in *Federal Trade Commission* v. *Millers' National Federation*, 47 F. 2d 428, 429 (C. A. D. C.) that—

> The power of investigation conferred upon the Commission by section 6 is different in character from the jurisdiction conferred by section 5. Section 6 contemplates an investigation for the collection of facts for the information of Congress in aid of the exercise of its legislative function, or for the President in aid of recommending necessary legislation.

We think that, as the following legislative history quite plainly shows, Congress in enacting Section 6 was especially concerned with empowering the Commission to investigate violations of law rather than merely to conduct general economic surveys as a basis for making recommendations to Congress and the President.

Much of the debate in Congress occurred in connection with the question of whether the Federal Trade Commission was to be authorized to investigate violations of law. The debates are applicable here, therefore, because Commission

orders to cease and desist, and court decrees enforcing these orders, are for the purpose of preventing violations of the laws administered by the Commission. As previously noted, a violation of a cease and desist order is in all cases a violation of law. Cf. *Amalgamated Utility Workers (CIO)* v. *Consolidated Edison Co., supra,* at pages 269–270. The administrative orders which are the subject of the instant suits had the purpose of obtaining information that would indicate to the Commission whether its order to cease and desist had been violated.

The bill as passed by the House made the Commission an investigatory and reporting agency. It transferred to the Commission the powers to investigate corporations previously vested in the Bureau of Corporations, and also gave the Commission certain other investigatory and reporting functions.* It did not contain provisions corresponding to those of Section 5 of the Act. In recommending the passage of the House bill, the Committee on Interstate and Foreign Commerce referred in that part of its report discussing Section 10 of the bill (H. Rep. No. 533, 63rd Cong., 2d Sess. 5 (1914)) to a statement made by the Attorney General "that the general policy which has hitherto been pursued of confining this department very closely to court work is a wise

* Sections 3, 10, 12, and 13 of H. R. 15613, 63d Cong., 2d sess. (H. Rep. 1142, 63d Cong., 2d sess., 11–13).

one, and that the duty of *detecting* offenses and furnishing evidence thereof should be committed to some other department or bureau." [Italics added.]

The bill passed by the House, H. R. 15613, was referred in the Senate to the Committee on Interstate Commerce. Instead of considering the House bill, the committee reported to the Senate a substitute for the House bill, S. 4160, 63rd Cong., 2d Sess. (1914), which was substituted for the House bill and was submitted to the Senate with Senate Report No. 597. In the Senate bill the investigatory and reporting functions given by the House bill were consolidated in Section 3.[9] Section 3 also specifically gave the Commission authority to investigate, and to procure information concerning, the affairs of corporations engaged in interstate commerce.[10]

[9] When the bill was rewritten in conference, Section 3 of the Senate bill became Section 6.

[10] The Senate Committee Report states that while large powers of investigation are given, "they are not greatly in excess of those possessed and for years exercised by the Bureau of Corporations" (Sen. Rep. 597, 63d Cong., 2d sess. 12).

As to the reasons for explicitly setting forth the Commission's investigatory powers respecting corporate affairs, instead of merely transferring the powers of the Bureau of Corporations, the report of the House conferees says (H. Rep. 1142, 63d Cong., 2d sess. 18):

"* * * This has been done because the bill now gives to the commission certain powers which so continuously and directly concern the business interests of the country that it is desirable to have the law show on its face its exact extent and application."

The substance of what became Section 5 of the Act was included in Section 5 of the Senate bill. After the Senate had passed this bill with some amendments, the conferees made a number of changes but retained the basic provisions of the Senate bill. The bill approved by the conferees was enacted and became law on September 26, 1914. It is clear, therefore, that the debate in the Senate on its bill is of great importance in determining whether Congress intended Section 6 (b) of the Federal Trade Commission Act to delegate to the Commission the power to investigate violations of law and violations of orders to cease and desist issued by the Commission under Section 5 of the Act.

The Congressional debates show that it was understood in the Senate that Section 6 (a) authorized investigations of violations of law by corporations. The following statement was made by Senator Cummins, who was one of the managers representing the Senate in the conference (51 Cong. Rec. 12919 (1914)):

> What have we done here? We have announced a commission that is intended to strengthen the antitrust law in the first instance. Its most valuable work will be in the discovery of offenses against the law and in rendering assistance to the courts and to the Department of Justice in the administration of the law. * * *

It was the opinion of Senator Cummins that the power of investigation being conferred upon the Commission by Section 3 of Senate Bill No. 4160, the forerunner of Section 6 of the Federal Trade Commission Act, and the purposes for which investigations might be made, extended to investigations into violations of law. In discussing the constitutionality of the section, he said (51 Cong. Rec. 12918–12919):

> Admitting that, I approach now the only other point that the Senator made respecting the constitutionality of this bill. It refers to section 3 and involves the inquisitorial powers of the commission, the powers of investigation.
>
> * * * We must limit our delegation of authority, so far as inquisition is concerned, to a subject not only upon which we have the constitutional right to legislate, but upon which we have legislated, *so that the investigation is connected with the enforcement of a law.* [Italics added.]
>
> * * * * *
>
> I think we have the right to confer upon the commission the authority to investigate any person, corporation, partnership, or association in order to ascertain whether that person, corporation, partnership, or association is violating a valid law of the United States. We have regulated commerce, both in the interstate-commerce law and in the antitrust law, and any investigation which it is necessary to make in order

to enforce either of those laws or any other law regulating commerce this commission has the right to make, in my judgment. * * *

* * * * *

But that does not touch the real question, which is, Can we give the commission the power to investigate a person, partnership, or corporation engaged in commerce among the States in so far as the investigation pertains to any regulation which Congress has constitutionally made respecting commerce among the States? I affirm, without much fear of contradiction, that our power of investigation is as broad as the power which we have exercised in legislation. Whatever we have imposed as a rule of conduct is the limit of our inquiry, and it has no other limit, save the limit of the Constitution preserving the papers of individuals from unnecessary search or seizure; and that, of course, controls every act of Congress, and there is no attempt here to pass beyond it.

In the course of an earlier discussion, Senator Cummins stated (51 Cong. Rec. 11448):

To the Senator from New Hampshire, I think I may say further this bill does confer upon the commission the most extensive inquisitorial powers, not alone with regard to the practice of unfair competition, but with regard to all the violations of the anti-trust law. * * * Although we have put

> it in many words, in many different ways, it really means that as to corporations engaged in commerce which is commerce among the States or with foreign nations, the Federal Government shall have the same right to inquire into their affairs as does the Government which created them.

Senator Newlands, the chief proponent of the bill in the Senate, made the following statement with regard to the inquisitorial powers over corporations given to the Commission by Section 3 of the Senate bill, which became with minor changes Section 6 of the Federal Trade Commission Act (51 Cong. Rec. 11110):

> Mr. President, it is very clear as to corporations that only those corporations are to make reports which the commission designates. The commission could designate one; it could designate a hundred; it could designate a thousand. I presume the commission would exercise that power with reference to some corporation that was under suspicion.

The following debate between Senator Newlands and Senator Sutherland indicates, we think, that the Senate understood that there was no question but that the Commission was being given the power to require reports from corporations in investigations of violations of law and, specifically, to require reports showing the manner and form of compliance with Commission

orders to cease and desist (51 Cong. Rec. 11603 (1914)):

> Mr. SUTHERLAND. * * * Is there any provision in the bill, either in this section or elsewhere, which would furnish any rule or standard according to which this commission must act in designating a particular corporation or corporations which must make these reports?
>
> Mr. NEWLANDS. I do not understand that under this provision it is necessary for the commission to make any general rule. It can specify any corporation, designate it, and call upon it to furnish statements and reports.
>
> * * * * *
>
> Mr. SUTHERLAND. But the proposed law does not require it.
>
> Mr. NEWLANDS. But I should also expect it to exercise the power of determining whether, if it was necessary to examine one, it was necessary to examine all. It seems to me that is a matter that is properly left within their discretion.
>
> * * * * *
>
> *I can imagine that there would be certain corporations that would be so condemned for unfair practices, and I can understand how the commission would want to keep that corporation under supervision for some time after it had ordered it to cease and desist and why it should require it to make certain statements and*

> *reports.* I can understand, with reference to a combination against which a decree of disorganization has been made, that it might be necessary for this body, which has the power vested in it to make investigations as to whether corporations against which such decrees have been made are following or are violating the law—I can understand in such instances how the commission might require statements from one and not from another, or perhaps require statements from both or discontinue the requirement as to one, being satisfied as to it, and continue it as to the other, being dissatisfied as to it. It seems to me that is a wise discretion that ought to be given to the commission. [Italics added.]

It must have been clearly understood in the House, when it adopted and passed the bill which came out of conference and which is the present Federal Trade Commission Act, that, with the addition of Section 5, Sections 6 (a) and (b) were automatically broadened to the extent that they apply to the entire Act and authorize reports from corporations in investigations as to violations of law. This is clear from a statement made on the floor by Representative Covington (51 Cong. Rec. 14925), who had introduced the original bill in the House. Mr. Covington explained "that the scope of the present act is such with respect to individuals and corporations engaged in interstate commerce that it ought to contain in its body all of its provisions in full, without having reference to any other existing

act to find the extent or application of the law." (51 Cong. Rec. 14,926). Mr. Covington made it clear that, with the addition of Section 5, reports might be required from corporations in connection with investigations of violations of law (51 Cong. Rec. 14925):

> The provision of section 9, paragraph 1, of the House bill, requiring annual reports from all corporations engaged in commerce having a capital of over $5,000,000, has been changed so as to leave the classes of corporations which shall be required to make such reports to the discretion of the commission. *It is apprehended that with the power in the commission to deal with unfair methods of competition, the annual reports and special reports to be required from those corporations which it is desirable for the commission to have report at all will be quite comprehensive.* It transpires that there are over 1,300 corporations, excepting banks and common carriers, in the United States engaged in the businesses defined as interstate commerce. *A very large number of those corporations do not belong to classes which are ever likely to be cited to appear before the commission for violations of law.* All information which may ever be wanted from them, in line with that rational and constitutional publicity which shall alike aid the public and industrial business, can be obtained from the occasional or special reports. The man-

> agers on the part of the House believe, therefore, that it was wise to yield in the matter of classification and not to require that all corporations of over five millions of capital shall arbitrarily be compelled to file an annual report with the Federal Trade Commission. [Italics added.]

The long continued administrative construction of the Act also supports the view that the Commission may utilize Section 6 (b) in carrying out its duties under Section 5. Some of the earliest orders entered in Section 5 proceedings required a report on compliance with the order, and in these early reports Section 6 (b) was referred to as the source of authority for such requirement.[11] Since 1920, the Commission has

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[11] *Federal Trade Commission* v. *Standard Oil Co. of Indiana*, 2 F. T. C. Dec. 26, 38–39 (1920); *Federal Trade Commission* v. *Standard Oil Co. of Indiana*, 2 F. T. C. Dec. 46, 55–56 (1920); *Federal Trade Commission* v. *Sinclair Refining Co.*, 2 F. T. C. Dec. 127, 139 (1919); *Federal Trade Commission* v. *Maloney Oil & Manufacturing Co.*, 2 F. T. C. Dec. 346, 356–357 (1920); *Federal Trade Commission* v. *Galena Signal Oil Co.*, 2 F. T. C. Dec. 446, 460 (1920); *Federal Trade Commission* v. *Lubric Oil Co.*, 3 F. T. C. Dec. 68, 77 (1920).

The Commission at a very early date interpreted Section 6 (b) as applicable to prohibitions of the Clayton Act, which the Commission has the duty of enforcing. One of the first cease and desist orders issued by the Commission was directed against violation of Section 3 of the Clayton Act. The Commission subsequently issued a further order which stated that it was based on the authority given by Section 6 (b), requiring the corporation to file a report on its compliance with the cease and desist order. *Federal Trade Commission* v. *A. B. Dick Co.*, 1 F. T. C. Dec. 20, 29–30 (1917).

included a requirement for a compliance report in practically every cease and desist order (of which some 3,800 have been issued), but did not in these later orders make express reference to the statutory basis for this requirement. And the provision in the Commission's Rules of Practice (at present embodied in Rule XXVI, *infra*, pp. 64–65), that the Commission, in its discretion, may require the filing of supplemental reports on compliance with cease and desist orders which have become final, has been in effect since 1936. *1937 Annual Report of Federal Trade Commission*, 147.[12]

[12] *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298, furnishes further support for the Commission's construction. In that case the Court held that the Commission's demands for the production of records, contracts, memoranda, etc., were so broad as to constitute an unconstitutional "fishing expedition." If, as the court below in the present case indicated, the Commission has no statutory authority to make investigations for the purpose of uncovering violations of law, the *American Tobacco* case could easily have been disposed of on that ground, and it would have been unnecessary to reach the constitutional question. Cf. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 208–210, n. 40.

b. *Rule XXVI of the Federal Trade Commission providing for reports and supplemental reports of compliance with cease and desist orders is a valid exercise of the rule-making power conferred by Section 6 (g) of the Act*

Independently of Section 6 (b), the Commission's power and duty of preventing unfair methods of competition under Section 5, implemented by exercise of the rule-making power given the Commission by Section 6 (g) (see Rule XXVI, Appendix, *infra*, pp. 64–65), authorizes it to require reports of compliance with Section 5 orders. Section 6 (g) provides that the Commission shall have power—

> From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions *of this Act.* [Italics supplied.]

There is no reason for supposing that when Congress said "Act" it meant not "Act" but merely "Section 6 of the Act." The language of Section 6 (g) is plain and the purpose of Congress could not have been more clearly expressed. Congress could scarcely be expected to have included a specific rule-making power in every section of the Act, when it provided in Section 6 (g) that the Commission shall have the power to make rules for the purpose of carrying out the provisions of the entire Act. Moreover,

at least three courts, including the Seventh Circuit in an earlier case, have held that Section 6 (g) confers upon the Commission the power to make rules for the purpose of carrying out the provisions of Section 5. *Kritzik* v. *Federal Trade Commission*, 125 F. 2d 351, 352 (C. A. 7); *Hill* v. *Federal Trade Commission*, 124 F. 2d 104, 106 (C. A. 5); *National Candy Co.* v. *Federal Trade Commission*, 104 F. 24 999, 1003 (C. A. 7); *E. Griffiths Hughes, Inc.* v. *Federal Trade Commission*, 63 F. 2d 362, 363 (C. A. D. C.).

The holding that the rule-making power of Section 6 (g) is inapplicable to Section 5 rests on essentially the same premise as that discussed *supra* in reference to the applicability of Section 6 (b). In both cases, to accept the court's view it is necessary to ignore what the Act in terms says and give to it a meaning supported neither by the legislative history nor administrative construction of the Act. In both cases it is necessary to view the Act not as a harmonious whole, but in effect as two separate unrelated pieces of legislation.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgments of the court of appeals should be reversed and the cases remanded to the

district court with directions to enter judgments for the United States.

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# APPENDIX

The Federal Trade Commission Act, 38 Stat. 717, as amended, 52 Stat. 111, 1028, 15 U. S. C. 41 *et seq.*, provides in part as follows:

> SEC. 5 (a). Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. [15 U. S. C. 45 (a).]
>
> (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said com-

plaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petitition has been duly filed within such time, or, if a petition for review has been filed within such time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly

filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate circuit court of appeals of the United States, in the manner provided in subsection (c) of this section. [15 U. S. C. 45 (b).]

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have

jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall

be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code. [15 U. S. C. 45 (c).]

(d) The jurisdiction of the circuit court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive. [15 U. S. C. 45 (d).]

* * * * *

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the circuit court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the circuit court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed. [15 U. S. C. 45 (g).]

* * * * *

(l) Any person, partnership, or corporation who violates an order of the Com-

mission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. [15 U. S. C. 45 (l).]

SEC. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships. [15 U. S. C. 46 (a).]

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless addi-

tional time be granted in any case by the commission. [15 U. S. C. 46 (b).]

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission. [15 U. S. C. 46 (c).]

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation. [15 U. S. C. 46 (d).]

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law. [15 U. S. C. 46 (e).]

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and deci-

sions in such form and manner as may be best adapted for public information and use. [15 U. S. C. 46 (f).]

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act. [15 U. S. C. 46 (g).]

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable. [15 U. S. C. 46 (h).]

* * * * *

Sec. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in

requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the com-

mission as hereinbefore provided. [15 U. S. C. 49.]

* * * * *

SEC. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be

subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000 or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continued for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court. [15 U. S. C. 50.]

* * * * *

SEC. 16. Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 14 or under subsection (l) of section 5, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection. [15 U. S. C. 56.]

Rule XXVI of the Commission's Rules of Practice, effective August 12, 1947, 12 Fed. Reg. 5444, 5448, provided in part as follows:

(a) In every case where an order to cease and desist is issued by the Commission for the purpose of preventing violations of law and in every instance where the Commission approves and accepts a stipulation in which a party agrees to cease and desist from the unlawful methods, acts or practices involved, the respondents named in such orders and the parties so stipulating shall file with the Commission, within sixty days of the service of such order and within sixty days of the approval of such stipulation, a report, in writing, setting forth in detail the manner and form in which they have complied with said order or with said stipulation; *Provided, however,* that if within the said sixty (60) day period respondent shall file petition for review in a circuit court of appeals, the time for filing report of compliance will begin to run de novo from the final judicial determination; * * *

(b) Within its sound discretion, the Commission may require any respondent upon whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order or with said stipulation.

# In the Supreme Court of the United States

OCTOBER TERM, 1949

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No. 273

UNITED STATES OF AMERICA, PETITIONER

*v.*

MORTON SALT COMPANY

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No. 274

UNITED STATES OF AMERICA, PETITIONER

*v.*

INTERNATIONAL SALT COMPANY

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*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## REPLY BRIEF FOR THE UNITED STATES

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The briefs filed by respondents raise several questions, not passed upon by either of the courts below, which perhaps call for brief reply.

1. It is contended that the Commission has not complied with the requirements of Sections 3 and 6 of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*).

(a) With respect to Section 3 of the Administrative Procedure Act, it is asserted that the

Commission has neither promulgated nor published adequate rules of practice or a statement of the procedure followed by it in these cases. At the outset, it should be noted that the Commission's order of September 2, 1947, gave respondents actual notice, the best possible form of notice, of every detail of the Commission's requirements. It informed respondents of the authority under which the Commission was requiring the special reports, why respondents were being asked to file them, what they were to contain, and when and where they were to be filed. Moreover, the Commission did promulgate and publish rules and statements outlining the procedure to be followed in the filing of the reports. Rule XXVI of the Commission's Rules of Practice expressly sets forth the Commission's practice in regard to the submission of compliance reports.

In compliance with the Administrative Procedure Act, the Commission has published in the Federal Register a Statement of its Organization, Procedures and Functions (12 Fed. Reg. 5450, 5452, August 12, 1947). Section 7.12 of that Statement sets forth in detail the Commission's practice regarding compliance reports:

> (a) Reports of compliance with orders to cease and desist are required in accordance with the provisions of § 2.26 of the rules of practice. The Commission may by order require such supplemental reports of compliance as it considers warranted. Reports

of compliance must consist of a full statement showing the manner and form in which the order has been complied with. Mere statements that the respondent is not violating the order are not acceptable. A factual showing is required sufficient to enable the Commission to appraise the manner and form of compliance.

(b) After an order to cease and desist issued by the Commission pursuant to the Federal Trade Commission Act has become final as provided for under section 5 of that act, and the Commission has reason to believe that a respondent has violated such order, it shall certify the facts concerning the violation to the Attorney General, who may institute a suit in one of the District Courts of the United States for the recovery of civil penalties as provided in the act. In proceedings under the Federal Trade Commission Act, where a Circuit Court of Appeals of the United States has by decree commanded obedience to the Commission's order, enforcement may be accomplished by way of contempt proceedings in the Circuit court. With respect to orders under the various provisions of the Clayton Act, enforcement must be accomplished by way of contempt proceedings.

This Statement unquestionably satisfies the requirements of Section 3 of the Administrative Procedure Act, which requires an agency to publish no more than the "general course and method

by which its functions are channeled and determined."

(b) As to Section 6 of the Administrative Procedure Act, the argument is, in effect, that since the Commission has violated the Federal Trade Commission Act by requiring compliance reports, it follows that the Commission has violated Section 6 of the Administrative Procedure Act, which forbids the Commission to violate the law. That section, so far as pertinent here, forbids an agency to make investigations "in any manner or for any purpose except as authorized by law." The purpose of this provision was explained by the Senate Judiciary Committee as follows (Sen. Doc. No. 248, 79th Cong., 2d sess., p. 27):

> Many statutes conferring administrative powers contain authorization to conduct investigations, but the same statutes rarely include language indicating that such investigations must be confined to the jurisdiction and purposes of the agency to which the authority is delegated. Subsection (b) states the established limitations. Although scattered precedents hold that such investigative powers are necessarily so confined, since otherwise delegations would be unrestrained and therefore unconstitutional, the basic rule should be included in any administrative procedure statute.

Respondents' contention under Section 6 of the Administrative Procedure Act depends for its determination, therefore, upon the correctness of

their contention as to the Commission's lack of authority under the Federal Trade Commission Act. For the reasons given in our main brief, we submit that the inquiry made here by the Commission was "authorized by law."

2. It is suggested that the Commission's order is so broad that it amounts to an illegal search and seizure of the respondents' records and books. Citing *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298, and related cases, respondents fear that the Commission desires to embark on a general fishing expedition through their files. The plain terms of the Commission's order, however, show that it has no such scope or purpose. The order requires each respondent to file a narrative statement as to its own pricing practices and the prices, terms, and conditions of the sale of salt employed. The documents required to be submitted are those through which prices, terms, and conditions of sale are customarily determined and which are used by the respondents and their employees for this purpose. Such documents are not only relevant to any report of pricing practices but must constitute the basis of such a report. It could not be seriously suggested either that prices and terms and conditions of sale are not relevant to an investigation of price-fixing, or that price-lists and freight rate books used in the sale of salt are not relevant to an inquiry into prices, terms, and con-

ditions of sale. By no reasonable construction can the order be interpreted as requiring respondents to pack up and ship to Washington any substantial part of their records.

3. It is also contended that the Commission's order, to the extent that it is enforceable by the forfeiture provision of Section 10 of the Federal Trade Commission Act (quoted in our main brief, p. 63), denies respondents due process of law. The procedure followed by the Commission in these cases is characterized as "ex parte", and it is stressed that both the Commission's order of September 2, 1947, and its later notices of default, were issued without prior notice to the respondents and without affording them a hearing.

Although respondents were not specifically told in advance that they would be required to furnish supplemental compliance reports, Rule XXVI put them on notice that such reports might be required from time to time. And it is significant that respondents at no stage of the proceedings ever requested the Commission to grant them a hearing; nor did they raise any issue before the Commission, by motion to vacate or otherwise, under which a hearing might have been granted. Furthermore, as was emphasized in our main brief, the Commission's order was preliminary in nature; its purpose was to elicit information as a basis for such further action as the facts might warrant. By hypothesis, the Commission

found it necessary to issue the order because it did not possess the information sought to be obtained from the respondents. In these circumstances, respondents have failed to show what useful purpose could have been served by a prior hearing, or in what respects they have been prejudiced by the absence of such hearing.

Nor could the default notices have taken respondents by surprise. Since the respondents were aware that they had not furnished the information required by the Commission, they knew or should have known that the notices of default required by the statute (section 10, main brief, p. 63) would be issued. Under the terms of the statute the only notice required is the notice of default, and thereafter there is a 30-day period of grace during which compliance may be rendered. Respondents should not be heard to complain because they were not given advance notice in addition to the 30-day warning which the law provides.

The contention is also apparently made that the forfeiture provision of Section 10 imposes an unconstitutional burden on respondents. The argument seems to be that the imposition of cumulative penalties during the period of non-compliance with the Commission's order somehow has the effect of denying them due process of law. But, as this Court has said, "We agree that it is for Congress to prescribe the penalties for the

laws which it writes." *Stewart & Bro.* v. *Bowles*, 322 U. S. 398, 404. Forfeiture provisions are a commonplace in federal regulatory legislation. In almost all such legislation Congress has provided for forfeitures, for failure to file a required report or for late filing, ranging in amount from $500 per offense to $100 per day. *E. g.*, Agricultural Adjustment Act, $500 per offense, 52 Stat. 65, as amended, 7 U. S. C. 1373; Longshoremen's and Harbor Workers' Compensation Act, $500 per offense, 44 Stat. 1439, as amended, 33 U. S. C. 930 (e); Communications Act of 1934, $100 per day, 48 Stat. 1077, 47 U. S. C. 219 (b); Federal Power Act, $1,000 per offense, 49 Stat. 861, 16 U. S. C. 825 (n); Federal Reserve Act, $100 per day, 48 Stat. 165, as amended, 12 U. S. C. 334; Interstate Commerce Act, $100 per day in one instance, up to $5,000 in another, 54 Stat. 918, 928, 56 Stat. 299, 49 U. S. C. 20 (7) (c), 322 (g), 1021 (d); Shipping Act, $100 per day, 49 Stat. 1987, 46 U. S. C. 820.

The constitutional authority of Congress to enact such provisions is clear. *Helvering* v. *Mitchell*, 303 U. S. 391; cf. *Meilink* v. *Unemployment Commission*, 314 U. S. 564; *Life and Casualty Co.* v. *McCray*, 291 U. S. 566, 574–575. In the latter case, the Court said: "One who refuses to pay when the law requires that he shall, acts at his peril, in the sense that he must be held to the acceptance of any lawful consequences attached to the refusal." (*Ibid.*)

The procedure authorized by Section 10 of the Federal Trade Commission Act for the recovery of forfeitures was implicitly sustained by this Court in *Federal Trade Commission* v. *Claire Furnace Company*, 274 U. S. 160, 170–171; and the $100 per day penalty has been declared valid by a lower court. *United States* v. *National Biscuit Co.*, 25 F. Supp. 329, 331 (S. D. N. Y.). A similar provision of the Interstate Commerce Act has been upheld by the Second Circuit. *United States* v. *Clyde S. S. Co.*, 36 F. 2d 691, 693–694 (C. A. 2), certiorari denied, 281 U. S. 744. And see *Bartlett Frazier Co.* v. *Hyde*, 65 F. 2d 350 (C. A. 7), certiorari denied, 290 U. S. 654.

4. Respondents renew their contention that Section 5 (l), which imposes civil penalties for violation of cease and desist orders that have become final, applies only to orders that have become final through failure to seek court review. As was shown in our main brief (pp. 23–24), no support for such a limitation is furnished by the language of the provision, its history, or the cases arising under it. Moreover, the legislative history specifically shows that the section was intended to apply to orders which have become final through court affirmance. The purpose of Section 5 (l), as stated in the House committee report, was as follows (H. Rept. No. 1613, 75th Cong., 1st sess., p. 4): "The object of the provision is to enforce obedience to the Commission's orders

to cease and desist after such orders have become final *through approval of the courts* or through the failure of respondents to seek review." [Italics added.]

Respectfully submitted.

PHILIP B. PERLMAN,
*Solicitor General.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

**Nos. 273-274**

UNITED STATES OF AMERICA,
Petitioner,
vs.
MORTON SALT COMPANY,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
vs.
INTERNATIONAL SALT COMPANY,
Respondent.

On Petition for Writs of Certiorari.

## BRIEF OF RESPONDENT, MORTON SALT COMPANY, OPPOSING CERTIORARI.

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On Petition for Writs of Certiorari.

## BRIEF OF RESPONDENT, MORTON SALT COMPANY, OPPOSING CERTIORARI.

### STATEMENT OF THE CASE.

Petitioner in its petition and brief has correctly cited the case below, it has properly indicated the basis of jurisdiction for consideration by this Court, and it has adequately recited the basis on which the case was disposed of, first by the District Court and then by affirmance in the Court of Appeals, Seventh Circuit, in favor of Respondent.

Likewise, it may be agreed that Petitioner, excepting for certain details and excepting for a matter of emphasis, has in the main outlined the facts and the questions at issue with reasonable accuracy. The deficiencies as to details and emphasis may be briefly supplied:

1. As noted by Petitioner (Pet. 3, 4), in 1943 a final decree was entered by the Court of Appeals, Seventh Circuit, against certain respondents, including Morton Salt Company, ordering them to cease and desist from certain practices in violation of Section 5 of the Federal Trade Commission Act. Petitioner fails to note that under this decree, the Court of Appeals reserved exclusive and continuing jurisdiction to enforce that decree (R. 19). *Consequently, this case must be judged in all its phases, not simply as one involving an order of the Federal Trade Commission, but as one involving a final decree, with jurisdiction exclusively reserved, of the Court of Appeals.*

2. Again as noted by Petitioner, in September, 1947, the Commission ordered the respondents in the original 1943 case to file additional and supplemental reports, together with certain supplemental price and freight data (Pet. 3, 4). The facts pertaining to this order, as related in the Petition, are both inaccurate and deficient. First, Petitioner describes the supplemental data called for as being "certain specific information as to prices and terms of sale" (Pet. 4), whereas in fact the order demanded that there be shipped to Washington, D. C. "a complete statement * * * of the prices, terms and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements distributed, published or employed in marketing salt from and after January 1, 1944" (R. 5). So there was nothing certain or specific about the demand. It was a sweeping, fishing expedition of all sales records for a period of three and a half years. Second, Petitioner states that Morton Salt Company failed to file the required supplemental compliance report (Pet. 4), whereas this Respondent did file a report advising the Commission that it was still complying with the 1943

decree in the manner set forth in its original 1943 compliance report (R. 21, 22). Consequently, the Commission might wish to complain as to the form and content of the supplemental report, but it cannot charge that no such report was filed. Third, the Petitioner nowhere in its petition mentions the fact that for over six years (from the original 1943 decree of the Court of Appeals to date), the Commission has made no claim that the original report was inadequate in any way, nor is there any hint in the petition that the September, 1947, order was issued *ex parte*, without any charge or suggestion that this Respondent was in any way disobeying the 1943 decree (R. 68, 69).

3. Finally, the petition offers no clue to the fact that the February, 1948, order of default was also *ex parte*, without notice or opportunity of hearing. Moreover, except for a few slight allusions, the petition avoids any mention of the fact that if the arbitrary and abortive "special report" label of Section 6(b) of the Federal Trade Commission Act can be impressed on these *ex parte* proceedings, then the road has practically been cleared by which the Commission can recover penalties ranging upwards to $100,000.00 from this Respondent.

**Reasons for Denying the Petition.**

The reasons for denying certiorari are so apparent as to be almost a matter of judicial notice, with respect to which no supplemental argument is needed:

1. The third paragraph of Section 10 of the Federal Trade Commission Act imposes the $100 per day penalty only against *corporations* which fail to file *annual* or *special reports*. Section 5 contains no reference to reports of any kind, and only Section 6(b) deals with annual or special reports by corporations. Consequently, unless

there is at least some faint relationship between Sections 5 and 6(b), the whole arbitrary procedure being pursued by the Commission in this case falls of its own weight. The absence of any such relationship is readily demonstrable:

(a) There is no cross-reference between the two sections. Their exclusive independence is clearly revealed by the fact that Section 5 deals with persons, partnerships and corporations, whereas Section 6(b) deals only with corporations. So if Section 6(b) is an enforcement aid to Section 5, there is presented the anomaly of invoking Section 6(b) when a corporation is the alleged culprit, but a necessary reliance on Section 5 alone if a person or a partnership is involved.

(b) The entire legislative history makes it abundantly clear that Section 5 involves the prosecution of specific statutory violations, whereas Section 6(b) concerns itself only with general economic surveys (R. 70, 71).

(c) This Court has already held that there is no connection: *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U.S. 160, 47 S. Ct. 553.

2. Section 5 is impregnated throughout with language which makes it completely clear that if, as and when (as in this case) a Commission case under Section 5 is taken to a Court of Appeals, the Commission thereby loses jurisdiction and the Court of Appeals attains and retains complete jurisdiction. This exclusive jurisdiction is reflected in the 1943 decree in this case. If the Commission, through its alleged rule-making power, is permitted to create its own self-serving and ever-changing description of "special reports", then it at once has the power to defeat the exclusive jurisdiction of the Court of Appeals under Section 5 as well as that of the District Court under Section 9.

3. The Commission itself during some thirty-four years of its existence has never regarded itself as possessing the power claimed here. A few cases (Pet. 8) are referred to in the petition in which allusion is made to Section 6(b), but none is more recent than 1920 and none involved a decree of a Court of Appeals. At no time has the Commission as to its 3,800 orders (Pet. 8) ever invoked either Sections 6(b) or 10. In fact, to this day the Commission does not claim in any of its published Rules, Statements of Organization, Procedure and Functions or Statements of Policies that it has the power asserted in this case, thereby making the assertion of that power a flat violation of Sections 3 and 6 of the Administrative Procedure Act.

4. The procedure attempted here is prohibited as an illegal fishing expedition under the Fourth Amendment of the Constitution, as interpreted by such cases as *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298, 44 S.Ct. 336; and the *ex parte* nature of the whole proceedings, where a challenge of the rights asserted by a governmental agency could result in tens of thousands of dollars in penalties, violates the Fifth Amendment as interpreted by such cases as *Wadley S. R. Co.* v. *Georgia*, 235 U.S. 651, 35 S. Ct. 214.

Respectfully submitted,

L. M. McBride,
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

No. 274

UNITED STATES OF AMERICA,
*Petitioner,*

*v.*

INTERNATIONAL SALT COMPANY.

## DEFENDANT INTERNATIONAL SALT COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

No. 274

UNITED STATES OF AMERICA,

*v.*

INTERNATIONAL SALT COMPANY.

## DEFENDANT INTERNATIONAL SALT COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

### Reasons for Denying the Writ

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."[1]

We maintain that there are no special or important reasons for granting certiorari herein. Inferentially recognizing that this is the condition, and presumably in the hope of overcoming it, the petitioner now attempts

[1] Revised Rules of the Supreme Court of the United States, Rule 38, subdivision 5; 306 U. S. 718.

to create, and in its brief to present, questions or issues which were neither disputed nor decided in the courts below.

Really the issue or question involved herein is an extremely narrow and limited one, as the Court of Appeals below explicitly held. We shall quote from its opinion in a moment, after a most summary statement of three preliminary matters.

The Court below had made its prior, or basic, decree on April 20, 1943, and the statute expressly made that basic decree "*final*".[2]

Moreover, the statute further emphasizes the intent of the Congress that the jurisdiction of the Court below to "enforce" or "modify" orders of the Commission "shall be *exclusive*".[3]

Because the 1943 decree was *final*, and because the Court's jurisdiction below was *exclusive*, the basic decree expressly left open a procedural door through which the Commission might enter the Court at any later time. The basic 1943 decree provided:

> "This Court retains jurisdiction of this cause to enter such further orders from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof * * *."[4]

Why, then, in 1948, almost five years later, did the Commission choose to disregard and to ignore this open door, and to disregard the plain requirements of orderly procedure? Why did the Commission choose this novel

[2] U. S. Code, Tit. 15, Sec. 45, subdivision (c) —unless reviewed by this Court on certiorari. No such review was sought at that time.

[3] U. S. Code, Tit. 15, Sec. 45, subdivision (d).

[4] Int. Salt R. 25.

procedure? Why did not the Commission choose to go to the Court below and seek from that Court its further order under the provisions of the 1943 order just quoted above? No brief of the Commission has ever vouchsafed answers to these questions.

Under such circumstances, and on these particular facts, all that the two Courts below have each held is, in effect, that the novel procedure chosen by the Commission in the present instance was not orderly.

For this reason the Court of Appeals pointed out that the broad argument of the Commission below (as here) as to its general powers "is beside the point" on the particular facts of this particular case. And that Court continued, disclaiming any broader decision, and said:[5]

> "* * * We are not here concerned with the power of the Commission, inherent or otherwise, to enforce its own orders, but with its power to enforce or aid in enforcement of a decree of this Court or an order of this Court. This we think it had on its own initiative no power or authority to do."

The present application for certiorari, in consequence, really involves only the very narrow question that was

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[5] While it is stated that this novel procedure of the Commission has been in its Rules since 1936 (Petitioner's Brief, p. 9), it lay dormant there for many years. This case is the first attempt to operate under that novel procedure—twelve years after the Rule was made; thirty-four years after the Commission was established. Thus there is *no* "long-continued administrative construction" (Petitioner's Brief, p. 8) to support this innovation, which, we think, is intended to by-pass the provisions of the statute making the Court's decree "final" and its jurisdiction "exclusive".

And for several decades the Commission has operated successfully without invoking this novel procedure.

[6] Int. Salt R. 75.

decided below—the Commission's erroneous choice of one out of various ways of procedure. That particular choice has been held by both of the courts below not to be orderly. There always was, and there still remains to the Commission, at least one other choice, on a plain path, and through an open door.

The Commission is not blocked, or stymied, or remediless. A very clear, an explicitly clear, road lies open to it:—to apply to the Court of Appeals for a further order under the basic 1943 decree.

We respectfully ask, therefore, how can it even be claimed that a mere selection of one way of proceeding can, under such circumstances, present "an important question of federal law which * * * should be settled by this court?"

Another choice—the open door to the Court below (which we have just mentioned above) still remains and will always continue to remain available to the Commission. The petitioning brief suggests no reason why *that* choice, *that* procedure, the orderly form of procedure, was not followed originally. But it is clear from the decision below that it has in no wise foreclosed the Commission from obtaining relief by seeking an orderly form of procedure. Here and now. Or at any later time.

## Why This Brief is so Brief

Because we think that the point or question involved is clearly so narrow we refrain from adding to the labors of this Court by answering the various arguments set forth in the petitioning brief, all of which we believe and respectfully submit are irrelevant and wholly beside the narrow point really involved herein.

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[1] Revised Rules of the Supreme Court, Rule 38, subd. 5(b).

## Two Facts

We should, however, like to direct the Court's attention to two facts:

1. At no place in the record does the Commission claim, even by inference, that this defendant has at any time or in any way disobeyed the 1943 decree.

2. This defendant did in fact file with the Commission a further report of compliance.*

## CONCLUSION

**It is respectfully submitted that no important question of federal law is involved; that there are no special or important reasons why this Court should review a mere *choice* of procedure; and that in the sound judicial discretion of this Court the petition for writs of certiorari should be *denied*.**

Respectfully submitted,

LOUIS H. HALL,
FREDERIC R. SANBORN,
*Attorneys for Defendant,*
*International Salt Co.*

Dated, September 6, 1949.

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* Int. Salt R. 25-26.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

**Nos. 273-274**

UNITED STATES OF AMERICA,
Petitioner,
vs.
MORTON SALT COMPANY,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
vs.
INTERNATIONAL SALT COMPANY,
Respondent.

On Certiorari to the United States Court of Appeals for the Seventh Circuit.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

**Nos. 273-274**

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| UNITED STATES OF AMERICA, Petitioner, vs. MORTON SALT COMPANY, Respondent. | On Certiorari to the United States Court of Appeals for the Seventh Circuit. |
| UNITED STATES OF AMERICA, Petitioner, vs. INTERNATIONAL SALT COMPANY, Respondent. | |

## BRIEF OF RESPONDENT, MORTON SALT COMPANY.

### STATEMENT OF THE CASE.

Petitioner in its brief has correctly cited the case below, it has properly indicated the basis of jurisdiction, and it has correctly cited and quoted the Sections of the Federal Trade Commission Act, as amended, which are involved in this case.

However, petitioner's statement of the facts is not in some respects entirely complete. Briefly, the basic facts are as follows:

1. The primary statute involved is the Federal Trade Commission Act, and the basic sections thereof at issue in this case are Sections 5, 6, 9 and 10 (Title 15 U.S.C.A.

Sections 45, 46, 49 and 50). As the Court will note from its review of those pertinent sections, Section 5, in substance, gives to the Federal Trade Commission the right to prohibit practices which constitute unfair methods of competition, and provides the procedure whereby that authority is exercised, as well as the appellate procedure whereby cease and desist orders entered under that section may be reviewed. Section 6 is devoted to general surveys by the Commission as well as to specific inquiries by the Commission at the instance of the President, the Congress or the Attorney General. Section 9, in general, gives certain powers to the Commission to aid in its investigations and proceedings, including certain subpoena powers, and that Section also provides for recourse to an appropriate District Court if the action of the Commission under Section 9 is disregarded by a corporation involved therein. Section 10 supplies certain penalities, including the $100 per day penalty involved in this case.

2. On September 18, 1940, the Federal Trade Commission (hereinafter referred to as the "Commission") filed a complaint against this and certain other respondents for alleged violations of Section 5 of the Federal Trade Commission Act (R. 18, 25). The proceedings were identified as F.T.C. Docket No. 4320, and were entitled "In the Matter of the Salt Producers Association, a corporation, et al." Subsequently, under date of November 10, 1941, the Commission issued its Finding As to the Facts and its Cease and Desist Order, in which certain respondents, including this one, were enjoined from continuing the alleged violations of said Section 5 (R. 18, 26). From this Cease and Desist Order, this and certain other respondents filed a petition for review in the Court of Appeals, Seventh Circuit, where the petition was docketed as No. 7909.

3. On March 8, 1943, that Court issued its opinion in said review proceedings, *Salt Producers Association* v. *Federal Trade Commission*, 134 F. (2d) 354, requiring the Commission to modify its Cease and Desist Order (R. 18). On April 20, 1943, the Court entered its Final Decree (R. 18, 19) which, in substance, did four things: (a) It enforced the modified Cease and Desist Order under Section 5 of the Federal Trade Commission Act; (b) it commanded this respondent (as well as the others) to obey said Decree, without prejudice to the right of the Commission to initiate contempt proceedings or penalty proceedings under Section 5(l) of the Federal Trade Commission Act; (c) it required this respondent (as well as the others) to file a compliance report within 90 days; and (d) it reserved to the Court "jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof * * *."

4. Under date of June 23, 1943, respondent filed its compliance report with the Commission as required by the Final Decree of the Court (R. 28-33).

5. When considered in the light of this present litigation, the period beginning with the date of the said compliance report *and continuing up to and including the date of this brief*, is chiefly remarkable for what did not happen: (a) During those six and a half years, the Commission never communicated to the respondent any objection as to the form or content of respondent's compliance report; (b) during those same six and a half years, the Commission has never charged the respondent, either formally or informally, with any violation of the Final Decree of the Court of Appeals; (c) during the same six and a half year period, the Commission has never re-

quested of that Court an order of any kind or description as regards respondent's conduct under either F.T.C. Docket No. 4320 or that Court's Docket No. 7909; and (d) at no time during that six and a half year period has th Commission initiated contempt or Section 5(l) penalty proceedings against respondent. (R. 26, 27)

6. Notwithstanding the foregoing, the Commission, without notice to respondent, without giving it an opportunity to be heard, and without filing any charges against it (R. 25), entered an order on September 2, 1947, which, in substance, commanded respondent to file a supplemental compliance report and also to file with the Commission a broad, vaguely defined compilation of price lists, freight rate books and other data for the preceding three and three-fourths years (R. 4, 5). This order purports to have been entered under *Sections 6(a) and 6(b)* of the Federal Trade Commission Act in aid of enforcement proceedings in Docket No. 4320 under *Section 5* of said Act. Respondent, under date of October 31, 1947, advised the Commission by letter that it was still complying as set forth in its original compliance report, but declined to file any of the additional data so vaguely specified in said September 2, 1947 order (R. 21, 22).

7. On February 27, 1948, again without notice to respondent, without giving respondent an opportunity to be heard, and without filing charges of violation, the Commission entered an order notifying respondent that it was in default under the *ex parte* order of September 2, 1947, and that, therefore, respondent, unless it complied within 30 days thereafter, would become liable for the payment of a penalty at the rate of $100 per day (R. 6, 7). This order was purportedly entered under the third paragraph of Section 10 of the Federal Trade Commission Act.

8. As noted above, the order of September 2, 1947, was purportedly entered in accordance with Sections

6(a) and 6(b) of the Federal Trade Commission Act. It was also purportedly entered pursuant to Rule XXVI of the Commission (R. 9, 10). No Rule is referred to as authority for the entry of the default order of February 27, 1948. With respect to this procedure, it should be noted that no published Rule or Statement of Procedure of the Commission specifies, outlines or even refers to the use of Sections 6(a), 6(b) or 10 of the Federal Trade Commission Act in aid of orders or decrees entered under Section 5 of the Act, nor is there any reference in the Commission's Rules and Statements of Procedure of the procedure followed in the proceedings outlined above (R. 17, 20, 27).

9. On May 18, 1948, petitioner filed its complaint herein, seeking to compel obedience to the Commission's order of September 2, 1947, and to obtain a penalty judgment against respondent in the amount of $100 per day from April 1, 1948 (R. 2-14). Thereafter, on the pleadings and motions for summary judgments, supported by affidavits, the District Court denied petitioner's motion for summary judgment and allowed that of the respondent (R. 56, 57). The Court of Appeals then affirmed that order.

## SUMMARY OF ARGUMENT.

It is important that the issues in this case be observed in their true perspective. A substantial portion of petitioner's brief is designed to convey the impression that an affirmance in this case would strip the Commission of its investigatory powers. That argument is both misleading and irrelevant so far as the issues in this case are concerned.

The Commission since its creation in 1914 has possessed and employed investigatory powers, and in so far as this respondent is concerned the existence and use of

those normal investigatory powers are not here in issue. All that is in issue is whether or not the Commission in the thirty-third year of its existence can suddenly concoct and employ a unique, arbitrary and illegal procedure (a) which finds no vindication in any section of the Federal Trade Commission Act, (b) which involves the use of powers which the Commission heretofore never thought it possessed and, in so far as its published Rules and Statements of Policy are concerned, which it does not now apparently think it has, (c) which has no support whatsoever in the legislative history of the Federal Trade Commission Act, (d) which violates the Fourth and Fifth Amendments to the Constitution, and (e) which is in direct conflict with the Federal Administrative Procedure Act.

The Court below has not divested the Commission of its "general" investigatory powers, nor is this respondent seeking any such result. All that has happened is that the Commission has been advised by two courts, first the District Court and then the Court of Appeals, that it has gone too far by inventing a procedure which usurps the rights of this respondent as well as the judicial prerogatives of the Court of Appeals.

## ARGUMENT.

The basic issue in this case can be bluntly stated: Is there to be judicial sanction of a capricious administrative order demanding action of this respondent under the threat of penalties which rapidly cumulate by tens of thousands of dollars? It is true that in 1940 the Commission filed a complaint against this respondent, as well as others, for alleged violations of Section 5 of the Federal Trade Commission Act. It is also true that in 1941 the Commission, in what is denominated as a "consent proceeding", entered a Cease and Desist Order against all the respondents named in that complaint, which order, after substantial modification, was ultimately approved in 1943 by a decree of the Court of Appeals. But does it necessarily follow that because of the existence of that decree, this respondent became an outlaw which is thereafter to be subjected to the whim and caprice of the Commission which originally succeeded in obtaining an adverse decree against the respondent?

Apparently it does if the Commission, through the office of the Attorney General, prevails in this case, for, after more than three years of complete silence and apparent indifference following the entry of that decree, the Commission suddenly issued its order of September 2, 1947—without warning, without notice, without a hearing, without supporting rules and without charges or even hints of violations.

The Commission in that September 2, 1947 order demanded two things:

1. It required respondent to "file additional reports showing in detail the manner and form in which (it has)

been, and (is) now, complying with said modified order to cease and desist * * * *". (R. 4, 5) Under date of October 31, 1947, respondent advised the Commission in writing that it was complying in the same manner as set forth in its original compliance report filed in 1943, to which original report the Commission had never communicated a single objection or comment (R. 21, 22).

2. It also required respondent, as a part of the foregoing additional report, to submit a complete statement "of the prices, terms and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements, distributed, published or employed in marketing salt from and after January 1, 1944." With this phase of the order, the respondent respectfully declined even to attempt compliance.

And then followed the $100 per day default order of February 27, 1948, which, like the first order, was without warning, notice, hearing or supporting rules. The basis of this default order was the charge that respondent had failed to comply with the September 2, 1947 order. But in what respect had respondent failed to abide by that order?

(a) As to the requirement that a supplemental compliance report be filed, respondent advised the Commission in writing that it was still complying as set forth in its original compliance report (a nine page, detailed document set forth as Exhibit "1" to the affidavit in support of respondent's motion for summary judgment). (R. 28-33) Presumably, however, this was not the detailed supplemental report sought by the Commission. But how, in all legal practicability, does the respondent otherwise show "in detail" that it has obeyed the decree of the

Court of Appeals? Should it have detailed its daily activities for the intervening four years so that the quantum of proof of the daily good behavior of the respondent would thereby have precluded, circumstantially, both the fact and possibility of violation? Or is the respondent innocent of such violations until proved guilty or at least charged with violations?

(b) As to the required supporting data pertaining to prices, terms and conditions of sale, freight rates, etc., for the period from January 1, 1944 to September 2, 1947, involving three and three-quarters years of business activity, the respondent respectfully suggests that it is engaged in a nationwide business of producing and selling scores of salt products and items. Consequently, save only for such of its files and records as pertain strictly to the production of its products, all its files and records to a greater or lesser degree, and either directly or indirectly, fall within the sweeping description of the second requirement of the September 2, 1947 order. By what conceivable authority, then, can the Commission demand the submission of all those records and files to its office in Washington, D. C., for anything less than a complete submission of those files and records would amount to something less than "a complete statement" of its prices, terms and conditions of sale, freight rates, etc. for the three and three-fourths years demanded by the Commission? And who in the respondent's organization, with its hundreds of employees and its numerous branch offices and plants, is able to certify that a *complete statement* on this score has been made, particularly in the face of the imposing penalties for mis-statements set forth in the first two paragraphs of Section 10 of the Federal Trade Commission Act?

These rather strident objections to the Commission's actions in this case are primarily designed to underscore the extremes to which the Commission has gone in the particular orders of September 2, 1947 and February 27, 1948. But it should not be forgotten that if this pattern of operation by the Commission is approved, then for the remainder of the corporate life of this respondent (and of all respondents similarly situated), the Commission on any given occasion—weekly, monthly, annually or otherwise—can make similar *ex parte* sweeping demands, with or without charges, with or without notice and with or without a hearing, with each demand being buttressed by the overhanging threat of penalties at the rate of $100 per day. This, without more, should suffice to condemn the procedure of the Commission in this case, but there are additional and equally compelling arguments which likewise condemn the action of the Commission in these proceedings.

## I.

### These proceedings are invalid under Section 5 of the Federal Trade Commission Act.

The Commission, to escape what to it are the disquieting restrictions of Section 5 of the Federal Trade Commission Act and to gain shelter under what are deemed by it to be the more benevolent provisions of Section 6(b), seeks to impress upon this Court the theory that Section 6(b) is practically the cornerstone of the Commission's power. In a variety of ways, this theme is repeated at intervals in petitioner's brief, and it furnishes the basis for some wholly irrelevant digressions on such questions as the general power of the Commission to conduct investigations, the general and specific power of the Commission

to make rules, and the general judisdiction of District Courts under the Federal Trade Commission Act. But nothing can disguise the fact that this is a Section 5 proceeding, and that Section 5 is the pivot around which all arguments must center and be tested. It only remains, then, to apply the negative and affirmative tests of Section 5 to the proceedings now before this Court in order to demonstrate the complete fallacy of the Commission's theory.

**A. Section 5 of the Federal Trade Commission Act is self-sufficient for enforcement proceedings with respect to decrees entered thereunder.**

Even a casual review of Section 5 of the Federal Trade Commission Act should establish beyond any reasonable doubt that it is self-sufficient for the purpose of enforcing cease and desist orders and decrees entered thereunder, without reference to Section 6 or any other section of the Federal Trade Commission Act.

1. There is no cross-reference between Section 5 and any other section of the Federal Trade Commission Act.

2. All the provisions of Section 5 are couched in terms of "persons, partnerships, or corporations", whereas Section 6 and each of its sub-sections are devoted only to "corporations". If, then, Section 6 is to be construed as an aid to the enforcement of decrees under Section 5, Section 6 falls short of giving to the Commission any enforcement relief except in so far as corporations alone are involved. Consequently, where, as in this case, individuals and partnerships are also the subject of an adverse decree, Section 6 cannot be invoked, so enforcement relief in those instances must be found only under Section 5. It violates every concept of statutory construction to assume that en-

forcement can be had against individuals and partnerships only by virtue of Section 5, but that Section 6 is either needed or available for enforcement of a Section 5 decree against corporations.

3. The self-sufficiency of Section 5 is silhouetted by the Wheeler-Lea Amendment of 1938 (Chap. 49, Sec. 3, 52 Stat. 111). Prior to that amendment, the courts time and again held that a Commission cease and desist order could not be enforced by the Commission except by first obtaining an enforcement decree from a Court of Appeals: *Federal Trade Commission* v. *Balme*, 23 F. (2d) 615, Cert. Den. 277 U.S. 598, 48 S.Ct. 560; *Federal Trade Commission* v. *Standard Education Society*, 86 F. (2d) 692. Even where a respondent appealed and lost, the Commission could not enforce its order unless it filed a cross-appeal or a separate petition for enforcement: *Federal Trade Commission* v. *Fairyfoot Products Co.*, 94 F. (2d) 844. And some Courts of Appeals even went so far as to rule that no enforcement decree would be entered unless and until there was proof of a violation of the Commission's original order: *Federal Trade Commission* v. *Morrissey*, 47 F. (2d) 101; *Federal Trade Commission* v. *Standard Educational Society*, 14 F. (2d) 947. Thus, prior to the 1938 amendment a Commission order was for all intents and purposes a legal nullity until it had received the endorsement of a Court of Appeals in the form of an enforcement decree.

In essence all that the 1938 amendment did was to attribute enforcement finality to a cease and desist order of the Commission where no appeal was taken to a Court of Appeals, thus obviating the necessity in such cases of the Commission having to go to a Court of Appeals for a final enforcement decree. As a complement to this provisions, Section 5(l) was added in 1938, permitting

the Commission to certify to the Attorney General for the purpose of suing for the $5,000 penalty provided therein should a violation of a Commission order occur. Thus, before 1938 the Commission could only resort to contempt proceedings in a Court of Appeals for a violation of the decree of enforcement of such a Court. After 1938 that remedy was still available if the case were taken to a Court of Appeals by the respondent, but if it were not, the Commission had the new enforcement weapon of Section 5(l) in those instances where its order became final without the benefit of a Court of Appeals. It hardly needs stating that if Section 6 were ever intended to be a part of the enforcement pattern, at least reference to that section would have been made in Section 5, if not at the time of its original passage in 1914, at least in 1938 when the amendment elaborated the enforcement machinery available to the Commission.

4. The Commission itself throughout its thirty-five years of existence apparently assumed this to be true for, until this case, there is no recorded case, decision or order, so far as this respondent can determine, in which the Commission has ever questioned the self-sufficiency, as well as the sole sufficiency, of Section 5 for enforcement proceedings. And to this date, notwithstanding the abortive departure from standard procedure in this case, the Commission's Rules and Statements of Policy are devoted entirely to the conception of Section 5 as the sole source of authority for enforcement procedure with respect to decrees entered thereunder. The failure of the Commission for so long a period of time to invoke so potent and unique a power as is asserted here, militates against the argument at this late date that the power has always existed, and that this is but a casual, routine use of that power: *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, ..... U. S. ....., 69 S. Ct. 1251.

**B. The Commission as a matter of legislative history and legal precedent can invoke section 6 only in support of general economic surveys and not in aid of enforcement proceedings under a section 5 order or decree.**

To a complete understanding of the legislative intent in passing the Federal Trade Commission Act, the law creating the Bureau of Corporations and the work done by that organization should be considered (Vol. 32, U.S. Stat. at Large, Part I, p. 827).

The Bureau of Corporations was the legal predecessor of the Federal Trade Commission and by Section 3 of the Federal Trade Commission Act, all clerks and employees and all records, papers and property of the Bureau of Corporations were merged into the Federal Trade Commission. It is obvious, therefore, that the Federal Trade Commission was intended to carry on, in a measure, work previously done by the Commissioner of Corporations. The purpose of Congress, as shown by the Committee Reports on the Trade Commission Act, was to enlarge somewhat the work which the Bureau had done. The Act creating the Bureau was in part as follows:

> "The said Commissioner shall have power and authority to make, under the direction and control of the Secretary of Commerce and Labor, diligent investigation into the organization, conduct, and management of the business of any corporation, joint stock company or corporate combination engaged in commerce among the several States and with foreign nations excepting common carriers subject to 'An Act to regulate commerce', approved February fourth, eighteen hundred and eighty-seven, and to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such

commerce, and to report such data to the President from time to time as he shall require; and the information so obtained or as much thereof as the President may direct shall be made public.

"It shall also be the province and duty of said Bureau, under the direction of the Secretary of Commerce and Labor, to gather, compile, publish, and supply useful information concerning corporations doing business within the limits of the United States as shall engage in Interstate commerce or in commerce between the United States and any foreign country, including corporations engaged in insurance, and to attend to such other duties as may be hereafter provided by law."

During its existence the Bureau of Corporations made extensive investigations and reports on a number of industries, notably the petroleum industry, the tobacco industry, the steel industry, the lumber and other industries. The reports on these industries were economic in character, covering many phases of these businesses. They were voluminous, running from three to five or more substantial volumes.

While it will be noted that the Commissioner of Corporations had power to make investigations into the organization, conduct and management of the business of corporations engaged in interstate commerce and to gather such information and data as would enable the President to make recommendations to Congress for legislation to regulate such commerce, it also appears that the information gathered by the Bureau of Corporations could be made public only at the direction of the President of the United States. It will also be noted that while the Commissioner of Corporations had authority to gather, compile, publish and supply useful information concern-

ing corporations doing business in interstate commerce, he did not have any express authority to require annual or special reports to be made to the Bureau. More important, the Bureau had no powers of prosecution or enforcement with respect to unfair methods of competition, such as are now found in Section 5 of the Federal Trade Commission Act.

The three primary considerations for creating the Commission, as shown by the House Committee's Report on Interstate and Foreign Commerce (Report No. 533, 63rd Congress, second session), were as follows:

1. To create an independant Commission which would have authority to make public the results of its investigations within its own discretion and not by the direction of the President;
2. To give such Commission authority to require annual or special reports from corporations engaged in interstate commerce; and
3. To give such Commission authorization to make investigations of alleged violations of the antitrust laws either at the direction of either House or Congress or the President.

While other less important powers were to be conferred on the Commission, the above appear to have been the primary considerations according to the House Committee Report. It should also be noted, that the House did not include any authority to prevent the use of unfair methods of competition.

Concerning the desirability of creating an independent commission which could make investigations on its own initiative and could make public the results thereof at its own discretion, the Report of the House Committee on Interstate and Foreign Commerce stated:

"But the great value to the American people of the Interstate Commerce Commission has been largely

because of its independent power and authority. The dignity of the proposed commission and the respect in which its performance of its duties will be held by the people will also be largely because of its independent power and authority. Therefore, the bill removes entirely from the control of the President and the Secretary of Commerce the investigations conducted and the information acquired by the Commission under the authority heretofore exercised by the Bureau of Corporations or the Commissioner of Corporations. All such investigations may hereafter be made upon the initiative of the Commission within constitutional limitations, and the information obtained may be made public entirely at the discretion of the Commission."

That the nature of the investigations to be made by the Federal Trade Commission, as conceived by the House Committee on Interstate and Foreign Commerce, very closely paralleled those made by the Bureau of Corporations is shown by the similarity of the language empowering the Commissioner of Corporations to make investigations and that empowering the new Federal Trade Commission to make investigations. The Commissioner of Corporations had the power to make "diligent investigation into the organization, conduct, and management of the business of any corporation, joint stock company, etc." Paragraph 6(a) of the Federal Trade Commission Act, as passed, authorizes the Commission "to investigate from time to time the organization, business, conduct, practices and management of any corporation engaged in commerce, etc."

With respect to the power to be given to the Federal Trade Commission to require annual and special reports, the House Committee on Interstate and Foreign Commerce in its Report No. 533, stated:

"While the powers, authority, and duties conferred upon the Bureau of Corporations and the Commissioner of Corporations are broad, there was a failure specifically to require the regular gathering of certain most important kinds of information through the medium of annual reports from industrial corporations engaged in interstate commerce ***.

"There has been serious question, however, whether regular annual reports from corporations engaged in interstate commerce could be required under the powers of the Bureau of Corporations. None were contemplated in the law creating that Bureau, and there was no compulsory way provided to obtain them.

"Therefore, in Section 9 of the bill, annual reports from the great industrial concerns of the country are provided for, setting forth essential facts connected with the organization, stockholders, financial condition, and general business conduct of those concerns.

"The testimony before the Committee by many men of large business experience was singularly in accord with the idea that these reports will afford one of the surest means of that publicity which will tend to an elevated business standard and a better business stability. All corporations engaged in interstate commerce having a capital of more than $5,000,000 are required to file these reports but it is not always the large corporation that has an organization or financial condition or a system of practices that requires publicity to bring about lawful methods in business. It is quite possible that a group of small corporations may be so operated as to cause serious violations of law. The Commission is given the power, therefore, to make classifications of corporations having a capital of less than $5,000,000, which shall be required to make the same annual reports that are to be made by the large corporations. This power of classification will relieve the mass of smaller business

concerns engaged in interstate commerce from the necessity of making such reports, while it reserves to the Commission that discretion which it ought to have to provide for national publicity of bad practices in interstate commerce without regard to the size of the corporations engaged in those practices."

So much for annual reports. With respect to the reason for giving the Commission authority to require special reports, and especially the Committee's conception of the nature of these reports, the House Committee Reports states:

"The Commission under this section may also require such special reports as it may deem advisable. By this means, if the ordinary data furnished by a corporation in its annual report does not adequately disclose its organization, financial condition, business practices, or relation to other corporations, there can be obtained by special report such additional information as the Commission may deem necessary."

When it is recalled that at the time the Committee Report was made the House bill did not contain any provision whatever declaring unfair methods of competition to be illegal, it is obvious that the Committee could not have had in mind authorizing special reports showing whether or not orders to cease and desist issued by the Commission were being observed. Indeed, the Committee Reports show beyond peradventure that the intention of Congress in providing for annual and special reports had no relation whatever to any prohibition of unfair methods of competition, but was solely related to investigations by the Commission of industries or corporations and the making of reports of the results of such investigations.

While the Report of the Senate Committee on the bill introduced in that body is by no means as specific

on the points above dealt with as is that of the House Committee, there is nothing in the Senate Committee Report which is in any way inconsistent with statements quoted from the House Committee Report.

The addition by the Senate of the prohibition against the use of unfair methods of competition obviously required further procedural provisions for the administration and enforcement of the Act. When the bill went to conference, therefore, all of the provisions for enforcing the Act were gathered together and now constitute a part of Section 5 and Sections 9 and 10 of the Act. This, however, did not change in the least the fact that Section 6(b) was complementary to Section 6(a) and that the two sections provided for economic investigations by the Commission. They had no relation whatever to Section 5 of the Act as passed, and no order requiring reports of compliance with an order to cease and desist entered under Section 5 is authorized by Section 6(b), nor does the penalty applicable for failure to file annual and special reports have any relation to the failure to comply with an order requiring information as to the manner in which an order to cease and desist is being observed.

This legislative intent of the independence of Section 5 from Section 6 is fully recognized in *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U.S. 160, 47 S. Ct. 553, which is fully discussed under Point II.

**C. Where an appeal has been taken, section 5 gives to the Court of Appeals sole jurisdiction of enforcement proceedings thereunder, subject only to the Commission's right to initiate section 5(l) proceedings.**

It should be reasonably clear that, under circumstances such as existed in this case involving an appeal from the

Commission to the Court of Appeals, Seventh Circuit, that Court under Section 5 acquired and thereafter retained exclusive jurisdiction with respect to the administration and enforcement of the decree entered by it.

Paragraph (c) of Section 5 is replete with that type of jurisdictional language. It provides that upon the filing of a petition for review "the court shall have jurisdiction of the proceedings and of the question determined therein, and shall have the power to make and enter upon the pleadings, evidence and proceedings set forth in such transcript a decree affirming, modifying or setting aside the order of the Commission, *and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite.*" (Italics ours.) As a further element of the complete jurisdiction of the Court of Appeals in such cases, it is provided that additional evidence can be adduced, not at the discretion of the Commission, but only at the discretion of the Court, and only upon such terms as the Court, not the Commission, may specify. Further, if additional evidence is adduced, the Commission may modify its findings but it can only recommend to the Court that its original order be changed— it cannot change the order of its own volition. Moreover, it is obvious from Section 5(g) (1) that the Commission can, within limitations, alter or modify its order in any case *up until, but not after,* the order has been appealed to a Court of Appeals. And finally, paragraph (d) of Section 5 specifically provides that "the jurisdiction of the Circuit Court of Appeals of the United States to affirm, *enforce,* modify or set aside orders of the Commission shall be *exclusive.*" (Italics ours.)

The Courts themselves have reached the obvious conclusion that this section means what it says — that where a petition for review has been filed with a Court of Appeals, the Court thereafter has exclusive jurisdiction of all that happens or may happen with respect to those proceedings: *L. B. Silver Co.* v. *Federal Trade Commission*, 292 Fed. 752; *Butterick Co.* v. *Federal Trade Commission*, 4 F. (2d) 910; *Federal Trade Commission* v. *Baltimore Paint & Color Works*, 41 F. (2d) 474; *Federal Trade Commission* v. *Herzog*, 150 F. (2d) 450. Cf. *International Union* v. *Eagle-Picher M. & S. Co.*, 325 U. S. 335, 65 S. Ct. 1166; *Federal Trade Commission* v. *Riddle Purchasing Co.*, 117 F. (2d) 29.

In *Wallace Corporation* v. *National Labor Relations Board*, 139 F. (2d) 952, the Court, under a similar provision of the National Labor Relations Act, carefully defines its reasons for jealously guarding its power to enforce its own decrees. The Board had petitioned the Court for leave to hold hearings in order to determine, among other things, whether or not the respondent had violated a previously entered enforcement decree of the Court. This the Court denied.

> "That is not a question which arises in the exercise of administrative powers by the Board, but one which, if it were properly before us, we should determine ourselves in the exercise of one of our most important judicial powers, the power to punish for contempt. When we desire a finding made for the exercise of that power, we shall either make it ourselves or have it made by a commissioner of our own appointment, whose findings will be subject to review by us under the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723 c, and not under the statutory rule that they must be accepted if sustained by substantial evidence, whether we agree

with them or not. When a court undertakes the serious business of punishing for contempt for disobedience of its orders, it should manifestly have complete control of the proceedings leading up to the punishment and under no circumstances should it, directly or indirectly, farm out its powers over contempt to an administrative agency." (p. 954)

Significantly, in the *Baltimore Paint & Color Works* and the *Herzog* cases cited above, the two Courts both treated the Commission as the Courts' "special master", so that the Commission lost its independent status with respect to the Courts' decrees and became only an arm of those Courts.

The Court of Appeals in this case followed this long established pattern of exclusive jurisdiction, and reserved in its final decree the power "to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof, and retains jurisdiction to modify the decree if changed future conditions should warrant such modification." It qualified this exclusive jurisdiction only to the extent of expressly granting to the Commission, in the event of violation, the right either to file contempt proceedings or to initiate penalty proceedings under Section 5(1). (Significantly, petitioner throughout its brief advances as proof of the "qualified" jurisdiction of the Court of Appeals, the existence of what the Commission assumes to be its independent right to prosecute Section 5(1) penalty proceedings. Yet the Commission, which drafted the final decree entered by the Court of Appeals in this case, was either unnecessarily verbose, or it doubted the existence of any such independent right and felt compelled to insert court sanction of the use of that remedy.)

In any event, what the Commission has done in this case is a far cry from this established interpretation of Section 5 and from the specific provisions of the final decree of the lower Court. The Commission did not file contempt proceedings as permitted by the decree of that Court, nor has it initiated Section 5(l) penalty proceedings, as also permitted by that Court's decree. What the Commission did do was to pursue a course in direct violation of the decree. It entered an *ex parte* order of its own without the authorization of the Court. That order required of this respondent a supplemental report, whereas the Court of Appeals' decree (R. 19) specified only that this respondent file an initial compliance report within ninety days of the decree, which requirement has already been fulfilled by the respondent. And this first *ex parte* order was then followed by a second *ex parte* order, which, like the first, was not authorized by the Court of Appeals, and which purported to invoke Section 10 penalties instead of Section 5(l) penalties as permitted by the statute and the decree of that Court.

In an attempt to justify its complete disregard of the lower Court's reserved jurisdiction, the Commission in both *ex parte* orders referred to Sections 6(a) and 6(b) of the Federal Trade Commission Act and to its own Rule XXVI as authority for what it was attempting to do. Whole segments of petitioner's brief are devoted to arguments in support of the Commission's right to rely on these dual sources of alleged power. These arguments can be readily disposed of.

First, with considerable elaboration under other points in this brief, it has been established that Sections 6(a) and 6(b) under no circumstances give to the Commission the authority or power claimed in these pro-

ceedings. But there is an additional reason for discounting completely the claim of authority under Sections 6(a) and 6(b) in this case. Assuming for the purposes of this particular argument that, in general, the Commission can claim under Section 6(b) the right to demand "special reports" for purposes other than general economic surveys, the fact still remains that any such power is now subordinate in this case to the reserved jurisdiction of the Court of Appeals. The Commission is not endeavoring to investigate this respondent generally: The Commission, by the very recitals in both *ex parte* orders, is endeavoring to make certain that this respondent is complying with that Court's decree. Consequently, the Commission under no circumstances can deal with this respondent as though it were merely another corporation under surveillance.

Nor can the Commission any longer deal with this respondent from a compliance standpoint as though it were still a respondent in Commission proceedings docketed as No. 4320. The Commission can only deal with this respondent from a compliance standpoint as a respondent to proceedings docketed as No. 7909 by the Court of Appeals, with respect to which that Court in its final decree has fixed the standard of this respondent's future conduct, and has reserved sole jurisdiction to determine the means by which this respondent's future conduct shall be measured in the light of that standard. By attempting to invoke Section 6(b) in support of its own *ex parte* proceedings, the Commission is in effect saying that it lies within its own *ex parte* power to modify the final decree of that Court, which decree contains as a component part a continuing reservation of jurisdiction over the conduct of this respondent. Nowhere in the Federal Trade Commis-

sion Act, and certainly nowhere in the cases decided by the Federal Judiciary, is there the slightest suggestion that the Federal Trade Commission or any other administrative agency can thus modify a decree of a Court of Appeals or any other Court.

Second, precisely the same argument applies with respect to the Commission's alleged authority under its Rule XXVI. Elaborate arguments are advanced by the petitioner in its brief in an effort to convince this Court that Section 6(g) gives to the Commission broad rule-making powers, and that in addition to the grant in Section 6(g), the Commission has "inherent" rule-making powers of such a scope as to permit the requirement of original compliance reports or supplemental compliance reports, or both, with respect to Section 5 proceedings. As a passing observation, this respondent seriously doubts whether Section 6(g) gives to the Commission rule-making power with respect to activities outside the scope of Section 6, and this respondent even more seriously denies the existence of an inherent rule-making power of such magnitude as will permit the Commission, through the medium of Rule XXVI, or by any other medium, to require either original or supplemental reports under Section 5 when that Section is completely silent as to any such authority: *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U.S. 463, 43 S. Ct. 450. The fact that this practice may have gone unchallenged in other cases is of no moment, for an unchallenged exercise of an illegal right does not supply a statutory deficiency. Congress carefully provided for certain types of reports in Section 6. Had it intended to make available to the Commission the right to demand reports under Section 5, it could have said so even as it did with respect to Section 6.

Moreover, only two situations in the entire scope of Anglo-Saxon law occur to the respondent as requiring a person or corporation under the jurisdiction of a final court order, to account by periodic reports for his or its conduct to that court or to any other governmental authority. (1) There is the case of parole in criminal law, where the parolee must periodically report as to his good behavior. And (2) there is the fiduciary (executors, administrators, guardians, receivers and, in certain instances, trustees) who must report to the court at prescribed intervals. In all other cases, compliance with a court order is presumed unless and until specifically questioned by an interested party before the court originally issuing the order. The assumed power of the Commission to require compliance reports of good conduct under a court decree (as contrasted to survey and data reports having nothing to do with court proceedings) is the exact antithesis of this general principle of law.

But this respondent is not particularly interested, at this point and as regards this issue, in debating the scope of the Commission's rule-making power. Assume, if it will save argument, that the Commission has broad rule-making power and that Rule XXVI with respect to the requirement of original or supplemental reports is entirely valid when addressed to a respondent within the Commission's own jurisdiction, and against which the Commission has directed a cease and desist order which has not been appealed. The fact still remains that this is no longer docket No. 4320 of the Federal Trade Commission: This is case No. 7909 of the Court of Appeals, Seventh Circuit, and under Section 5 of the Federal Trade Commission Act that Court's final decree, and not the Commission's cease and desist order, is the sole yardstick

of this respondent's conduct. It would indeed be a legal anomaly if the Commission under its alleged statutory or inherent rule-making power could, in effect, amend or modify that Court's final decree at will.

The obvious realities of this case cannot be evaded by the Commission. Regardless of the Commission's alleged power and authority to invoke Section 6(b) or to make rules, once a Court of Appeals has taken jurisdiction, as is true in this case, the Commission's conduct as well as the respondent's is thereafter measured by the final decree of the Court of Appeals, excepting and only if, as and when that Court of Appeals chooses, on its own motion or on motion of either the Commission or a respondent, to amend, modify or implement its own final decree.

**D. The order of the District Court does not deprive the Commission of investigatory powers.**

Only one final comment need be made with respect to the proposition that Section 5 alone controls in this case. In an effort to free itself of the legislative confines of Section 5, the petitioner has seasoned almost every phase of its argument with the complaint that the order of the lower Court deprives it of investigatory powers, thereby reducing the Commission to a state of helpless inertia. This, of course, is complete nonsense and the petitioner's own brief proves this to be true.

According to the petitioner (P. Br. 49) the Commission has entered some 3,800 cease and desist orders since its creation in 1914. Yet this case apparently represents the only instance in the thirty-five years of the Federal Trade Commission's existence in which it endeavored to conduct an "investigation" after a decree of a Court of Ap-

peals by the procedure attempted in this case. In fact, save only for the instances cited in petitioner's brief (P. Br. 48), with respect to which a more thorough discussion follows in a later portion of this brief, Sections 6(a), 6(b) and 10 have never been alluded to. So the bald fact remains: Either the Commission has found it possible by means other than the procedure pursued here to investigate compliance with some 3,800 cease and desist orders, or else for thirty-five years it has failed in its public charge and has sat idly by without exhibiting any curiosity as to whether any one of those 3,800 orders was being complied with.

It should be a matter of judicial notice that under Section 5 the Commission, throughout its entire history, has employed investigators to determine whether or not the provisions of Section 5 have been violated and whether or not a complaint should be issued. This very commonly accepted mode of investigation appears to be implemented by Section 9 of the Federal Trade Commission Act, but in any event it certainly has never occurred to the Commission for thirty-five years that it needed the elaborate and arbitrary procedure at issue here as a preliminary to issuing complaints. Yet, as the petitioner so aptly puts it in its brief (P. Br. 39), "As previously noted, a violation of a cease and desist order is in all cases a violation of law". So, if this be true, then it is extremely difficult to perceive why a harsh and arbitrary procedure need be invoked to ascertain the existence or non-existence of violations of a court decree, when no such procedure appears to be essential to the Commission's determination of statutory violations in the first instance.

The short and obvious answer is that the petitioner's whole concern about the Commission's investigatory

powers being constricted as a result of the decision in this case, is nothing more than a diverting tactic from the real issue. This constant obbligato running throughout the theme of petitioner's argument serves only to inject an issue which is not in the case, and tends to befog the issues which are in the case. At no time has this respondent attempted to argue that it was immune to investigation by the Federal Trade Commission simply by virtue of the original case having come within the jurisdiction of the Court of Appeals. This respondent assumes that in some manner or other the Commission can, if it chooses, continue to police the compliance of this respondent by appropriate investigatory procedures. Whether or not the appropriate procedure is (a) by petitioning the Court of Appeals for permission to investigate the respondent with a view to possible contempt or Section 5 (l) proceedings, (b) by an assertion of a right of investigation under Section 9, even though it be an investigation supplemental to a Court of Appeals decree, or (c) by an assertion of an alleged inherent right of investigation under Section 5, is a matter of law not at issue in this case, and it represents an issue as to which this respondent at the moment is completely indifferent. The sole issue is whether or not the Commission on a wholly *ex parte* basis can issue an order, not to investigate the records of this respondent, but to compel this respondent to file compliance reports and to ship to Washington, D. C. its sales records for four years as a belated follow-up to a Section 5 decree, with the threat of a $100 a day penalty being asserted on an equally *ex parte* basis for failure to comply, all under the thin disguise that the Commission is acting under Section 6(b).

## II.

**The corporate penalty provision of Section 10 can be invoked only for failure to file annual or special reports authorized under Section 6(b) of the Federal Trade Commission Act.**

This proposition would seem to be out beyond question by the plain wording of that paragraph since no other reasonable construction of that paragraph can be made. However, if confirmation be needed it would seem to be found in the legislative history of the Act. Section 9 of the House Bill No. 15613, which was the measure which passed the House and went to conference, is as follows:

> "Sec. 9. That every corporation engaged in commerce excepting corporations subject to the Acts to regulate commerce, which, by itself or with one or more other corporations owned, operated, controlled, or organized in conjunction with it so as to constitute substantially a business unit, has a capital of not less than $5,000,000, or, having a less capital, belongs to a class of corporations which the commission may designate, shall furnish to the commission annually such information, statements, and records of its organization, bondholders and stockholders, and financial condition, and also such information, statements, and records of its relation to other corporations and its business and practices while engaged in commerce as the commission shall require; and to enable it the better to carry out the purposes of this Act the commission may prescribe as near as may be a uniform system of annual reports. The said annual reports shall contain all the required information and statistics for the period of twelve months ending with the fiscal year of each corporation's report, and they shall be made out under oath or otherwise, in the discretion of the commission, and filed with the commission at its office in Washington within three months after the close of the year for which the report is made, unless

additional time be granted in any case by the commission. The commission may also require such special reports as it may deem advisable.

"If any corporation subject to this section of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission for making and filing the same, or shall fail to make and file any special report within the time fixed by the order of the commission, such corporation shall forfeit to the United States the sum of $100 for each and every day it shall continue in default in making or filing said annual or special reports. Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of the Acts to regulate commerce."

It is clear, therefore, that as the bill passed the House, this penalty of $100 a day for failure to file annual or special reports was limited to what ultimately became Section 6(b) of the law as finally passed.

Moreover, this legislative intent is apparent from the wording of the Act itself. In the first place, Section 5 already contains a penalty clause, Section 5 (l), which is available to the Commission if Section 5 orders are violated. It is inconsistent with normal statutory construction to assume that Congress intended the Section 10 penalty to be in addition to the Section 5(l) penalty in connection with the same offense. Certainly this must be so in the absence of an express provision to the contrary, and there is no such provision in the Federal Trade Commission Act.

In the second place, the Section 10 penalty clause makes it available only against corporations, whereas Section 5 deals with persons, partnerships and corporations. As discussed at length in Point I above with respect to Sec-

tions 5 and 6, it is too much strain on the legal imagination to believe that Congress intended a penalty clause, restricted in its use to corporations only, to be used in aid of a Section which contains no such restrictions. So because Sections 6 and 10 deal only with corporations, whereas Section 5 deals with persons, partnerships and corporations, it follows that Sections 6 and 10 are closely related, but that Section 5 is wholly unrelated to either.

In the third place, the penalty is not only restricted in its use to corporations, it is further restricted in its use to such corporations as may fail to file an "annual or special report required by this Act". Aside from Section 10, the only reference in the Act to annual or special reports is found in Section 6(b), which is concerned with general surveys and not Section 5 proceedings. Section 5 does not even allude to reports of any kind, and the supplemental compliance report demanded by the Commission in its order of September 2, 1947, is nothing more than its own notion of what it thinks it needs to enforce Section 5 orders. So a supplemental compliance report is not a report required by the Act, and it certainly is not the kind described in Section 6(b). Consequently, the Commission's use of the penalty in this case is untenable.

Finally, if there is any question as to the validity of this argument, it has been removed by this Court. The $100 penalty was involved in *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U.S. 160, 170, 47 S. Ct. 553, 555. In its decision this Court said:

> "Apppellees were not charged with practicing unfair methods of competiton (Section 5 * * *), or violating the Clayton Act * * *. Orders under such charges can be enforced only through a Circuit Court of Appeals * * *.

> "The action of the Commission here challenged must be justified, if at all, under the paragraphs of Sections 6 and 9, * * * and the only methods prescribed for enforcing orders permitted by any of these paragraphs are specified in Sections 9 and 10 * * *."

In brief, the Commission has already been told by Congress and this Court that it cannot use Section 10 to help it under Section 5.

But should the legislative and judicial history of Section 10 still leave any residual doubt as to the inapplicability of that Section to the respondent in these proceedings, then the disclosures in petitioner's brief of the Commission's motives, intentions and hopes with respect to Section 10 should convince this Court of the imperative need for a sharp curb on the Commission's use of that Section. The petitioner's argument speaks for itself.

1. In an effort to establish the "historical right" of the Commission to employ Section 6(b) in proceedings other than those involving general economic surveys (which would carry with it the concurrent "right" to invoke Section 10 penalties), the petitioner cites seven early cases where Section 6(b) was used as the authority for requiring original compliance reports in conjunction with cease and desist orders of the Commission (P. Br. 48). Curiously enough, all of these instances occurred in the years 1917 to 1920, and there appears to have been no recurrence of the practice until within the last few years. This fact in itself suggests a long-standing lack of conviction on the part of the Commission with respect to the position now being taken in this case. Nevertheless, those early cases supply the initial clues to the course of conduct now being pursued by the Commission. One of the seven cases, *Federal Trade Commission* v. *A. B. Dick*

*Company*, 1 F.T.C. Dec. 20, 29-30 (1917), involved an order under Section 3 of the Clayton Act (Title 15 U.S.C.A. 14), and each of the other six cases involved orders of the Commission under both Section 5 of the Federal Trade Commission Act and Sections 2 or 3 of the Clayton Act. Significantly, the Federal Trade Commission Act became effective September 26, 1914, whereas the Clayton Act did not become effective until October 15, 1914. Yet the Commission blandly took the position that it could apply Section 6(b) (and presumably the penalty provision of Section 10 as well) of the Federal Trade Commission Act to orders entered under a wholly different Act which was not even in existence when the powers under Section 6(b) were created. In fact, during that same period the Commission even pursued an identical course of action against an *individual*, notwithstanding the fact that Sections 6(b) and 10 explicitly refer only to corporations: *Federal Trade Commission* v. *Brushart*, 3 F.T.C. 78.

2. Then, after a lapse of twenty years, came the revival of this procedure. Three cases were involved: *Federal Trade Commission* v. *United Buyers Corporation*, Docket No. 3221; In the Matter of *An Investigation of the Rubber Tire Industry*, File No. 203-1; and In the Matter of *Bissell Carpet Sweeper Company*, File No. 1-11269. Not one of those cases came up under any section of the Federal Trade Commission Act. Each involved violations of Section 2 of the Clayton Act, as amended in 1936 by the Robinson-Patman Act (Act of June 19, 1936, Chap. 592, 49 Stat. 1526). So the Commission is not content with its attempt to press Section 10 into service in connection with proceedings under Section 5 of the Federal Trade Commission Act. It is equally anxious to wield the

threat of Section 10 penalties in every phase of its activities under all Acts from which it derives jurisdiction.

3. These specific instances of the Commission's indiscriminate use of Section 6(b) supply tangible evidence for the flat charge that in this case the Commission is seeking to combine Sections 6(b), 6(g) and 10 as a means of circumventing the statutory jurisdiction granted to District Courts and Courts of Appeals. Reconstructed the process is as follows:

(a) Section 6(b) gives to the Commission, under certain limited circumstances, the power to require "both annual and special reports." Section 10 permits the invocation of penalties for failure "to file any annual or special reports".

(b) Contrasted to this very specific language, the September 2, 1947 order of the Commission makes no reference to either annual or special reports: Rather, the language throughout, which was of the Commission's own composition, deals with "additional reports", "an additional and supplemental report showing the manner and form of compliance", and "supplemental reports of compliance". Only after encountering opposition did the Commission recognize its own "inadvertence" in employing the "additional report" label instead of the "special report" label, thereby depriving the Commission of whatever transitory advantage it might have gained had the September 2, 1947 order been camouflaged with a Section 6(b) "special report" label.

(c) Now it is suggested that this inadvertence is of no moment because of the alleged broad rule-making power contained in Section 6(g). This rule-making power, so it is asserted, should enable the Commission to

designate a compliance report, either initial or supplemental, under Section 5 as a Section 6(b) "special" report, with the demand for such a "special report" to be automatically attended by the persuasive threat of a $100 a day penalty under Section 10.

(d) But it should be obvious that if this initial bit of legerdemain is now permitted by this Court, then the process of usurping judicial power as well as judicial protection for corporate respondents has only begun. In the initial steps of any Federal Trade Commission proceedings, the Commission under Section 9 can examine, copy and subpoena any documentary evidence of a corporation being investigated or proceeded against. Yet, as a curb against transgressions of these powers, a corporation can obtain a test in a District Court of the use of those powers on any given occasion by the simple expedient of declining to comply with the demands of the Commission. By the same token, once a Commission proceeding has passed beyond the investigation stage, the Commission's whole conduct is then defined explicitly by Section 5, and any corporation against which an order has been entered has the opportunity of judicial review in a Court of Appeals with respect to the Commission's order or the conduct of the proceedings giving rise to the order. Now, in taking the position that Section 6(g) gives to it the right to impress on any demand it sees fit to make the label of a "special report", the Commission is placing itself in the unassailable position of being able to circumvent all the protective provisions accorded corporations by Sections 5 and 9. In other words, whether the Commission's demand be a fishing expedition, a subpoena in disguise or a "compliance report", the magic label of the "special report" leaves to

the corporation to which the demand is directed only two alternatives: Either it must capitulate, regardless of the legality of the Commission's demands, or, if it refuses to comply, it can never test the legality of its position unless and until it suits the Commission's pleasure to initiate a suit to recover constantly mounting penalties at the rate of $400 per day. It is inconceivable that Congress ever thought it was granting such a sweeping, dictatorial power to the Commission through the happy combination of Sections 6(b), 6(g) and 10.

Apparently only a judicial decree can negative the chilling prospect of this unbridled use of Section 10 penalties. In apprasing this prospect, it should be remembered that in the *Claire Furnace* case this Court did more than merely decide that Section 10 penalties were applicable only to Section 6 and not Section 5 proceedings. It was also held that the right of the Commission to demand reports with respect to which Section 10 penalties are presumably applicable could not be tested by injunction proceedings, but only by the hapless respondent asserting a defense if, as and when the Commission chose to initiate a suit for those constantly accruing penalties. Yet even in a case which so narrowly restricted those penalty provisions to Section 6(b) reports, this Court consumed not months but years in arriving at its decision. The case was decided in the lower court on January 2, 1923. Thereafter it was appealed to this Court, and, after having once been argued, was reargued on November 24, 1925, but even then the decision was not handed down until April 18, 1927. If this narrow test of penalties gave pause to this Court in the *Claire Furnace* case, how much more pause should now be given in a case involving the Commission's avowed attempt to broaden, al-

most without limitation, its usage of the penalty provisions.

The judicial answer, of course, lies in such decisions as *United States* v. *Harris*, 177 U. S. 305, 20 S. Ct. 609, and *Bolles* v. *Outing Company*, 175 U. S. 262, 20 S. Ct. 94. Those two cases typify a long series of decisions of this Court to the effect that all penal statutes shall be strictly construed, and that unless a given situation or a given person, partnership or corporation with respect to which or against whom the penalty provisions are directed, fit precisely the statutory requirements or conditions upon which the penalties are predicated, the penalty provisions will not be imposed.

Section 10 is unquestionably such a penal statute, and as such it must be strictly construed against the Commission in its effort to invoke its provisions in this case. Accordingly, unless it is preponderantely clear that the things called for by the Commission in its order of September 2, 1947 constituted a "special report" within the meaning of Sections 6(b) and 10, and unless it is equally clear that the Commission has the power to require such a "special report" of this particular respondent under the particular circumstances prevailing in this case, there can be no alternative other than an affirmance of the decree below. That neither this respondent nor the situation involved in this case falls within Section 10 should be abundantly clear even from the petitioner's brief itself.

## III.

**The enforcement procedure adopted by the Commission in these proceedings is in violation of the provisions of the Federal Administrative Procedure Act.**

The preceding points have been devoted entirely to arguments, from various tangents, to the effect that the procedure adopted by the Commission and in issue in this case violated the provisions of the Federal Trade Commission Act. The very fact that the Commission and this respondent are before this Court in an effort to litigate those issues demonstrates with unquestioned clarity that, regardless of the merits of the arguments under the two preceding points, the entire procedure adopted by the Commission represents a thorough-going violation of the Federal Administrative Procedure Act (5 U.S.C.A. 1001-1011).

There is no doubt as to the legislative background of that Act. The multiplicity of administrative agencies, coupled with the broad latitudes granted them in their rule-making and quasi-judicial capacities, when accompanied by a growing maze of rules and procedures in aid of their triple position of investigator, prosecutor and judge, made necessary the adoption of a curb on possible excesses in order that administrative law and procedure would bear some resemblance to the Anglo-Saxon conception of appropriate judicial proceedings. The Administrative Procedure Act is that curb: *House Committee Report*, 1946; *National Labor Relations Board* v. *Robbins Tire & Rubber Co.*, 161 F. (2d) 798.

Section 6(b) of the Administrative Procedure Act incorporates this legal concept in its curb on agency excesses:

> "No process, *requirement of a report*, inspection, or other *investigative act* or *demand* shall be issued,

made or enforced in any manner or for any purpose *except as authorized by law.*" (Italics ours.)

As noted in the Senate Committee Report, 1945, p. 32 and in the House Committee Report, 1946, p. 32, this section was designed "to preclude 'fishing expeditions' and investigations beyond the jurisdiction or authority of an agency". The Commission seeks to do just that in this case by endeavoring to draw the inappropriate veil of Section 6(b) of the Federal Trade Commission Act over what are obviously proceedings which can relate only to Section 5 of that Act.

The key section of the Act in so far as this litigation is concerned is found in Section 3(a) which provides as follows:

> "Every agency shall separately state and currently publish in the Federal Register • • • (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public • • •. *No person shall in any manner be required to resort to organization or procedure not so published.*" (Italics ours.)

Thus, this Section prescribes the nature of the notice which the Federal Trade Commission must give the public, including this respondent, as to any rule or procedure which the Commission proposes to use on an adversary basis. Section 6(a) then prescribes the right of an individual against whom the Commission has taken an adversary position:

> "• • • Every party shall be accorded the right to appear in person or by or with counsel or other duly

qualified representative in any agency proceeding. * * *"

This Act became effective June 11, 1946, or approximately a year and a quarter prior to the entry of the *ex parte* order on September 2, 1947. What, then, are the cogent factors with respect to the Commission's "compliance" with the requirements of the Administrative Procedure Act in this case:

1. The Federal Trade Commission Act, under Section 5 of which this whole controversy started, became effective September 26, 1914, or approximately thirty-three years prior to the entry of the September 2, 1947 order.
2. Except as to provisions not material here, it was never amended and the relationships between Sections 5, 6 and 10 have remained unchanged.
3. No occasion can be discovered during those thirty-three years in which the Commission endeavored to use Sections 6(a) and 6(b) in aid of enforcement proceedings with respect to a Section 5 decree. (In none of the cases referred to under Point II had a court decree been entered.)
4. Although on a few rare occasions, the Section 10 penalty provision has been invoked against recalcitrant corporations where general economic surveys were being conducted under Sections 6(a) and 6(b), that penalty provision has never been invoked, so far as respondent can discover, in aid of enforcement proceedings under a Section 5 decree.
5. The Commission caused to be published in the Federal Register (12 F.R. 5997) a set of Rules of Practice, effective September 10, 1947. The Commission also published in the Federal Register (12 F.R.

6003) the Statements of its Organization, Procedure and Functions, likewise effective September 10, 1947. And a Statement of Policy was published in the Federal Register (12 F.R. 5811), revised to August 19, 1947. These three publications presumably represent the Commission's attempted compliance with the Administrative Procedure Act.

6. The Statement of Policy, revised to August 19, 1947 as noted above, which was only fourteen days prior to the entry of the September 2, 1947 order, contains absolutely no reference to Sections 5, 6 and 10, or to policy or procedure with respect to any of those sections.

7. Rule XXVI, paragraph (b), although without support of statutory authority, asserts the right of the Commission to demand of a respondent against whom a decree has been entered that it "file with the Commission from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order * * *". The Commission in its order of September 2, 1947 presumably bases its authority on Sections 6(a) and 6(b) and demands not only a supplemental compliance report, but also insists on making a fishing expedition into the general files of the respondent for a period of almost four years. Rule XXVI (b) is notable for the fact that no reference to any section of the Federal Trade Commission Act is made, much less to Sections 6(a) and 6(b), nor does it pretend to authorize the fishing expedition provided for in the *ex parte* order of September 2, 1947. In fact, no published rule of the Commission pretends to describe the "rights"

asserted by the Commission in the September 2, 1947 order, nor is there any reference anywhere to any of the sections involved in this case. Most important, it should be noted that these Rules became effective eight days *after* the entry of the September 2, 1947 order.

8. Even more revealing is the Commission's Statement of its Organization, Procedure and Functions, also published eight days *after* the September 2, 1947 order. Paragraphs 10, 11 and 12 obviously refer to procedures and policies with respect to adversary proceedings under Section 5, with paragraph 12 alluding to compliance reports as required by Rule XXVI, but without reference to Sections 6(a) or 6(b). Of even more significance is paragraph 12 (b), in which the Commission states that if it suspects a violation of a Section 5 decree, it will certify the facts to the Attorney General for a penalty suit under Section 5(l) or will commence proceedings before an appropriate Court of Appeals. Of equal significance is paragraph 17 which states that under Section 6 the Commission has broad powers to investigate business generally and to make business surveys. These functions of the Commission are performed by its *Office of Industrial Economics* as contrasted with the *Office of Compliance* for Section 5 enforcement proceedings.

Only one conclusion can be reached. The respondent is before this Court as a "legal guinea pig" under a procedure that had not been thought of by the Commission for thirty-three years, and which the Commission had still not disclosed to its proposed victims in its Rules and Practices which became effective eight days after the

novel procedure in this case was initiated. As disclosed by the Congressional debates and reports, it was exactly because of this weather vane type of administrative procedure that the Administrative Procedure Act was adopted, and that Act condemns the entire procedure in this case, regardless of the arguments pro and con as to the possible right of the Commission, as a matter of statutory construction, to use Sections 6 and 10 in aid of Section 5.

## IV.

**The scope of the order in issue and the procedure employed in connection therewith violate the Fourth and Fifth Amendments to the Constitution.**

In effect, the Federal Administrative Procedure Act is a legislative reminder to administrative agencies that there is still a Constitution. The early excesses of private business produced the various "anti-trust laws", of which the Federal Trade Commission Act is one. The subsequent zealousness of administrative agencies produced the Administrative Procedure Act, lest the remedy become worse than the malady. So it is still legally fashionable to test what the Commission is attempting to do here by appropriate provisions of the Constitution.

### A. The Fourth Amendment.

Literally pages of quotations from court decisions could be inserted at this juncture in the brief to demonstrate why the order of September 2, 1947 is entirely invalid, regardless of the ultimate decision which may be made as to the other issues in this case. However, reference to a few of the salient factors on this point should suffice.

Having eliminated Sections 6 and 10 of the Federal Trade Commission Act as possible sources of authority

for the September 2, 1947 order, it follows that the only possible remaining sources are Sections 5 and 9 of that Act. Section 5 can be disregarded at the outset, because it makes no provision for the issuance of orders in the nature of a subpoena duces tecum such as the one involved here; and although at least two cases (*Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160, 47 S. Ct. 553; *Chamber of Commerce* v. *Federal Trade Commission*, 280 Fed. 45) have hinted at the possibility that Section 9 can be invoked only in aid of Section 6, Section 9, nevertheless, is worth exploring as the only possible source of authority for the September 2, 1947 order.

The first paragraph of Section 9 gives the Commission "access to, for the purposes of examination, and the right to copy any *documentary evidence* of any corporation being investigated or proceeded against". (Italics ours.) Thus, the authority of this paragraph contains four restrictions—the Commission must examine the evidence in the respondent's premises as contrasted to forcing the respondent, as in this case, to ship it without recall to Washington, D. C.; the examination must be confined to *documentary evidence*, and not, as here, expanded to a general fishing expedition through four years of all the sales files of the respondent; the *documentary evidence* may be copied, whereas the order complained of makes no provision for copies; and the examination can be made only if it is coupled with formal investigations or proceedings against the respondent, and not, as here, where there are no pending proceedings and where no formal charges of any kind have been initiated or filed. This right of examination is further supplemented in the first and second paragraphs of Section 9 by giving to the Commission the right to subpoena *documentary evidence* in connection with hearings. But here the order is not a

subpoena, nor does the Commission pretend that it is, and the order is not coupled with any hearing in connection with which the subpoena power would otherwise lie. In short, the Commission is endeavoring to add a new device nowhere authorized by the Federal Trade Commission Act.

Even assuming that Section 9 can somehow be construed as authority for the use of a device such as the September 2, 1947 order, the courts have emphatically and repeatedly made it clear that only *documentary evidence* can be the subject of Commission activity. The leading case is probably *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 44 S. Ct. 336. In that case this Court observes that if the demands go beyond the scope of *documentary evidence*, it becomes an unconstitutional fishing expedition (264 U. S. 298, 305, 44 S. Ct. 336, 337):

> "Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire * * *, and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime.
>
> * * * *
>
> "It is contrary to the first principles of justice to allow a search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up * * *. The right of access given by the statute is to documentary evidence,—not to all documents, but such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer. * * * We assume that the rule to be ap-

plied here is more liberal, but still the ground must be laid, and the ground and the demand must be reasonable.

"• • • •

"We have considered this case on the general claim of authority put forward by the Commission. The argument for the government attached some force to the investigations and proceedings upon which the Commission had entered. The investigations and complaints seem to have been only on hearsay or suspicion; but even if they were induced by substantial evidence under oath, the rudimentary principles of justice that we have laid down would apply. We cannot attribute to Congress the intent to defy the 4th Amendment or even to come so near to doing so as to raise a serious question of constitutional law."

This same basic law is reflected in a multitude of other cases: *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 14 S. Ct. 1125; *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 29 S. Ct. 115; *Federal Trade Commission* v. *Baltimore Grain Co.*, 284 Fed. 886; *Goodyear Tire and Rubber Company* v. *National Labor Relations Board*, 122 F. (2d) 450; *Federal Trade Commission* v. *Millers' National Federation*, 23 F. (2d) 968.

How, then, does the September 2, 1947 order fare in the light of these tests? First, there have been no charges of any kind filed against the respondent in which it is asserted that respondent is or may be violating the decree of the Court of Appeals. In fact, there is nothing anywhere in the record which suggests that the Commission even suspects the existence of possible violations. Accordingly, how can the September 2, 1947 order be measured in terms of what is or is not *documentary evidence* unless there is some charge to which that "evidence" can be related? Second, the Commission did not demand just

certain documents pertaining to a certain transaction or to certain possible courses of conduct: Rather, the Commission demanded all the pricing and freight rate files of the respondent, not for just one transaction, nor for one year, but for almost four years. And third, the Commission is not seeking to examine and copy those records, or some possibly appropriate portion of them, nor has it opened hearings with respect to which it is endeavoring to exercise its subpoena power. On the contrary, the Commission insists that in connection with what appears to be merely a routine checkup, the respondent must send all of its records to Washington, D. C., compiled at respondent's expense and shipped at respondent's cost, so that if, as and when the Commission gets around to reviewing those items, it can fish through four years of a substantial portion of the respondent's corporate records. Respondent asserts that this order fails to meet even one of the several tests set forth above.

### B. The Fifth Amendment.

The fact stands undisputed that the order of September 2, 1947, requiring the respondent to file certain data with the Commission, as well as the order of February 27, 1948, authorizing notice to the respondent of the accrual of the $100 per day penalty, were entered without notice of any kind or description to the respondent and without the respondent having had any opportunity to be heard on either occasion. It is the respondent's position that this combination of acts was a violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

Admittedly, the *ex parte* action of the Commission in connection with its order of September 2, 1947, had it

stood alone, would not have constituted a violation of the due process clause. That order of the Commission, while final in so far as the Commission was concerned, was not enforceable by it until a hearing *de novo* was had in some District Court of the United States in connection with the Commission's effort to enforce that order. The cases almost uniformly hold that if a hearing is accorded a respondent in agency proceedings, either by the agency or by some duly authorized court, before the objectionable order can be enforced against such respondent, the requirements of due process have been satisfied.

But this is not that sort of a case. Here the Commission coupled with its *ex parte* procedure the invocation of an onerous penalty in the amount of $100 per day, thereby leaving the respondent in the perilous position of having to accept the Commission's edict of September 2, 1947 without a hearing, or run the extreme risk of ultimately having been found wrong, in which event a judgment would lie against the respondent for the accrued penalties. Knowing of the over-burdened conditions of the federal courts, this respondent had to assume that it was risking a penalty judgment of from $60,000 to $100,000 if the respondent's objections to the *ex parte* activity of the Commission should be ultimately overruled on appeal.

Even this computation of a burden of from $60,000 to $100,000 was predicated upon the assumption that the Commission would ultimately initiate enforcement action at an early date in the proceedings so as to bring the matter to an early test. This the Commission has done in this particular case, but there is nothing in the Federal Trade Commission Act or in any other act which compels the Commission to take prompt enforcement action. From all that appears in the statutes and the decided cases, it lies within the Commission's power literally to "sweat

out" the respondent for any given number of years with the contingent liability constantly mounting at the rate of $100 per day.

On repeated occasions the courts have denounced this type of administrative procedure as being a denial of due process. This established principle of American jurisprudence is reflected in the decisions of *Wadley S. R. Co. v. Georgia*, 235 U. S. 651, 35 S. Ct. 214, and *Ex Parte Young*, 209 U. S. 123, 28 S. Ct. 441. In both instances this Court held unconstitutional state statutes which included heavy daily penalties against railroads refusing to comply with intra-state railroad rates fixed by the state. The announced theory of both cases was that a party confronted with the regulatory acts of a governmental body was effectively proscribed from testing regulatory measures by normal judicial process because of the extreme contingent liability of the regulatory acts of the governing body were upheld.

These two cases were followed in *Oklahoma Operating Co.* v. *Love et al*, 252 U. S. 331, 40 S. Ct. 338, involving regulatory action which could be tested only by contempt proceedings and which, if lost, would result in an accrued penalty of $500 per day. This Court noted that "Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the actions relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates." (252 U. S. 331, 337, 40 S. Ct. 338, 340.) Again, in the case of *Beckler Produce Co.* v. *American Railway Express Co.*, 156 Ark. 296, 246 S. W. 1, the Court declared unconstitutional a statute which provided for an accrual penalty of $2 per day intended for the benefit of a claimant for damaged or lost mer-

chandise while in transit with the Express Company. The statute left the time of filing suit to the discretion of the claimant, subject only to a liberal statute of limitations, so that the Express Company, however valid it thought its defense might be, faced an eventual judgment against it for the penalty if it failed to make prompt settlement of any such claim. See also similar results in *Southwestern Telephone & Telegraph Co.* v. *Danaher*, 238 U. S. 482, 35 S. Ct. 886; *Superior Laundry Co.* v. *Rose*, 137 N. E. 761, 193 Ind. 138; *Inter-Southern Life Insurance Co.* v. *McElroy*, 38 F. (2d) 557; *F. C. Henderson* v. *Railroad Commission of Texas*, 56 F. (2d) 218.

In short, the due process clause precludes the Commission from pursuing the course followed here. If the Commission has the rights claimed here, then to that extent the Federal Trade Commission Act is unconstitutional. But if the Act gives the Commission no such right, then the procedure of the Commission is unconstitutional.

## CONCLUSION.

By a series of cumulative arguments, this respondent has sought to demonstrate to this Court that the procedure being tested here is wholly novel and wholly arbitrary in its concept; that it violates the express provisions of Section 5 of the Federal Trade Commission Act and represents a prohibited invasion of the decree and powers of the Court of Appeals; that it can find literally no sanction in either the legislative or judicial history of Sections 6 and 10 of the Federal Trade Commission Act; that because the Commission has not even dignified this procedure by reflecting it in its published Rules and Statements of Policies, it violates the basic provision of the Federal Administrative Procedure Act;

and that in the light of the judicial interpretations of the Fourth and Fifth Amendments to the Constitution, neither the orders nor the procedures pertaining to the orders can survive a constitutional test. To all of this the petitioner has done little more than to attempt to create some legal ghosts—that the order of the District Court, as affirmed by the Court of Appeals, deprives the Commission of its investigatory powers; that the order improperly confines the Commission's use of Sections 6 and 10 with regard to the use of reports in compliance proceedings; and that the order also undermines the alleged rule-making power of the Commission, whether that power stems from the supposed authority of Section 6(g) or from the alleged inherent authority attributable to administrative agencies in general. None of these ghosts exists. The fact remains that the Commission embarked on a wholly illegal course of action, which, if it receives judicial sanction, will amount to a complete redrafting of the Federal Trade Commission Act. The District Court and the Court of Appeals abruptly dashed the hopes of the Commission in this regard, and this respondent asks of this Court that the order below be affirmed for all the cumulative reasons described above.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

No. 274

UNITED STATES OF AMERICA, PETITIONER,

*v.*

INTERNATIONAL SALT COMPANY, RESPONDENT.

## BRIEF FOR RESPONDENT, INTERNATIONAL SALT COMPANY

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*International Salt Company.*

APPEAL PRINTING CO., INC., 150 CEDAR STREET, NEW YORK, WO 4-3083

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

No. 274

UNITED STATES OF AMERICA, *Petitioner*,

*v.*

INTERNATIONAL SALT COMPANY, *Respondent*.

## BRIEF FOR RESPONDENT, INTERNATIONAL SALT COMPANY

### Questions Presented

The petitioner now attempts to create, and in its brief to invite this Court to decide, large and general questions which were neither disputed nor decided in the courts below.

Really the question involved herein is an extremely narrow and limited one, as the Court of Appeals below explicitly held.

The Court of Appeals had made its prior, or basic, decree on April 20, 1943, and the statute expressly made that basic decree "*final*".[1] Further, the statute emphasizes the intent of the Congress that the jurisdiction of

[1] U. S. Code, Tit. 15, Sec. 45, subdivision (c) :—unless reviewed by this Court on certiorari. No such review was sought at that time.

the Court of Appeals to "enforce" or "modify" orders of the Commission "shall be *exclusive*".[2]

Because the 1943 decree was *final*, and because the Court of Appeals' jurisdiction below was *exclusive*, the basic 1943 decree expressly left open a procedural door through which the Commission might enter that Court at any later time. The basic 1943 decree provided:

> "This Court retains jurisdiction of this cause to enter such further orders from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof * * *."[3]

Why, then, in 1948, almost five years later, did the Commission choose to disregard and to ignore this open door, and to flout the plain requirements of orderly procedure? Why did the Commission choose this novel procedure of attempting to collect a harsh forfeiture upon a strained interpretation of the statute? Why did not the Commission choose to go to the Court of Appeals and seek readily and quickly from that Court its further order under the provisions of the 1943 order just quoted above? No brief of the Commission has ever vouchsafed answers to these pertinent questions.

Under such circumstances, and on these particular facts, all that the two Courts below have each held is, in effect, that the novel procedure chosen by the Commission in the present instance was not orderly procedure.[4]

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[2] U. S. Code, Tit. 15, Sec. 45, subdivision (d).

[3] Int. Salt, R. 25.

[4] While it is claimed that this novel alleged procedure of the Commission has lurked in its Rules since 1936 (Petitioner's Brief, p. 49), it lay dormant there for many years. This case is the first attempt to claim any power to operate under that novel alleged procedure—twelve years after the Rule was made; thirty-four years after the

For this reason the Court of Appeals pointed out that the broad argument of the Commission below (as here) as to its general powers "is beside the point" on the particular facts of this particular case.[5] And that Court continued, disclaiming making any broader decision, and said:

> "* * * We are not here concerned with the power of the Commission, inherent or otherwise, to enforce its own orders, but with its power to enforce or aid in enforcement of a decree of this Court or an order of this Court. This we think it had on its own initiative no power or authority to do."

The present writ of certiorari, in consequence, really involves only the very narrow procedural question that was decided below, viz.:

> 1. Whether, after the Court of Appeals has rendered its *final* decree, retaining *exclusive* jurisdiction of the cause in order "to enforce compliance in every respect * and to prevent evasion thereof" the Commission may proceed further *in that cause*, in enforcement proceedings directly against *that* respondent, quite independently of the Court of Appeals.

---

Commission was established. Thus there is *no* "long continued administrative construction" (Petitioner's Brief, pp. 11, 38, 48) to support this innovation, which, we think, is intended to by-pass the provisions of the statute making the Court of Appeals' decree "final" and its jurisdiction "exclusive".

And for several decades the Commission has operated successfully without invoking this novel procedure. It therefore seems strange for the Commission to claim (Petitioner's Brief, p. 13) that the decision below placed "a *general* limitation upon the Commission's powers," and that that decision placed "*novel* and impractical *restrictions*" upon the Commission (Petitioner's Brief, p. 32)!

[5] Int. Salt, R. 75.

No other, no larger, no more general, question needs to be decided herein, because no other, no larger, no more general, question was actually decided by the courts below.

## Statement of Additional Facts

1. At no place in the record does the Commission claim, even by inference, that this respondent has at any time or in any way disobeyed the 1943 decree.

2. This respondent did in fact file with the Commission a further report of compliance, as the District Court below specifically found,[6] so that the learned judge who dissented below in the Court of Appeals was in factual error when he stated that "The defendants refused to comply * * *," etc.

3. The repeated claims below of the Commission that what it required this respondent to do was to file a "special report" have been abandoned. The Commission has now changed its position, and it now claims—despite the very strict rules of law against forfeitures—that its requirement in its order of an "additional"[8] report, or of an "additional and supplemental"[9] report, or of a "supplemental"[10] report was tantamount to requiring a "special" report, so as to entitle it to recover a strict

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[6] Int. Salt, R. 54-55; see also, 25-26.

[7] Int. Salt, R. 78. The Commission might wish to dispute the content of the supplemental report, but it cannot justly and fairly claim that no supplemental compliance report was filed with it. Also see, *infra*, pp. 66, 70-72.

[8] Int. Salt, R. pp. 4-5 (twice).

[9] Int. Salt, R. 4 (once).

[10] Int. Salt, R. 5 (twice). In its present brief the Commission appears to concentrate exclusively upon "supplemental" (pp. 10, 49, 50).

forfeiture which the statute provides only for utter failure to file a "special" report.[11] *The word "special" does not appear a single time in the entire order of the Commission.*

4. On or about September 10, 1947 the Commission published in the Federal Register an amended statement of its "Organization, Procedures and Functions", as required by the Administrative Procedure Act of 1946.

5. Section 12 of such statement was printed by the Commission in a pamphlet dated November 20, 1947. (*The prior pamphlet* of the Commission, which is dated December 11, 1946, *contains* in its topic, "Organization, Procedures and Functions", *nothing whatever corresponding to the Section 12 of November, 1947.*) As printed for the first time in the November 20, 1947, pamphlet the new Section 12 reads:

"COMPLIANCE AND ENFORCEMENT

"Sec. 12. (a) Reports of compliance with orders to cease and desist are required in accordance with the provisions of Rule XXVI of the Rules of Practice. The Commission may by order require such supplemental reports of compliance as it considers warranted. Reports of compliance must consist of a full statement showing the manner and form in which the order has been complied with. Mere statements that the respondent is not violating the order are not acceptable. A factual showing is required sufficient to enable the Commission to appraise the manner and form of compliance.

"(b) After an order to cease and desist issued by the Commission pursuant to the Federal Trade

[11] See the sage observations of the Court of Appeals below, Int. Salt, R. 73, middle of the page.

Commission Act has become final as provided for under Section 5 of the Act, and the Commission has reason to believe that a respondent has violated such order, it shall certify the facts concerning the violation to the Attorney General, who may institute a suit in one of the District Courts of the United States for the recovery of civil penalties as provided in the Act. In proceedings under the Federal Trade Commission Act, where a Circuit Court of Appeals of the United States has by decree commanded obedience to the Commission's order, enforcement may be accompanied by way of contempt proceedings in the Circuit Court. With respect to orders under the various provisions of the Clayton Act, enforcement must be accomplished by way of contempt proceedings.

"(c) Matters relating to reports of compliance with, and violation of, or enforcement of Commission orders are handled in the Division of Compliance, which is a part of the General Counsel, under the supervision of an Assistant General Counsel, except that the Division of Appellate Proceedings of the General Counsel handles appearances in the Circuit Courts in enforcement proceedings by way of contempt.

"(d) Matters relating to reports of compliance with voluntary agreements to cease and desist (stipulations) are handled in the Bureau of Stipulations."

*Significantly and curiously, the Commission's "Statement of Policy"* (pp. 35-42) *filed and published under the Administrative Procedure Act makes no reference to the foregoing provisions.*

(Thus, because of the requirements of the Administrative Procedure Act, the Commission's order of September 2, 1947, was without any lawful foundation.)

6. But the Commission's November 20, 1947, statement of its "Organization, Procedures and Functions" also contained a Section 17. Except for minor changes of official nomenclature, not material herein, Section 17 of 1947 is in all other respects identical with Section 15 of December 11, 1946. As printed in the 1947 pamphlet Section 17 reads (emphasis supplied):

"GENERAL ECONOMIC SURVEYS[12] AND REPORTS

"Sec. 17. (a) Under section 6 of its organic act, the Federal Trade Commission has broad powers to ascertain the facts with respect to the organization, business, conduct, practices, and management of any corporation subject to its jurisdiction, and the relations of any such corporation to other corporations and to individuals, associations, and partnerships. The Commission has power under this section to require such corporations to file with it, *annual* or *special* and both *annual* and *special reports* or answers in writing to specific questions, furnishing to the Commission such information as it may require respecting the business, conduct, practices, management, etc., of any such corporation and its relation to other business enterprises. *These functions of the Commission are performed by its Bureau of Industrial Economics.*

"(b) The administration of this Bureau is conducted by a Director who is also the Chief Economist, and by a Chief Accountant, a Chief Statisti-

[12] Thus the phraseology, "general economic surveys", at which the petitioner somewhat bridles in its brief (pp. 2, and twice at 11) was the phraseology which the Commission itself selected to characterize the extent of its powers to require "annual" or "special" reports from corporations.

And such was the "long-standing administrative construction" which the Commission had given to the scope of its powers *ante litam motam*.

cian and an Assistant Chief Economist who are Assistant Directors of the Bureau.[1] The Commission on its own initiative or upon the application of the Attorney General, may direct this Bureau, whenever a final decree has been entered against any defendant corporation under the Antitrust Acts, to ascertain and report the economic effects of such decree and the manner in which it is being carried out.

"(c) The purposes of these general economic surveys are to ascertain and report the facts to the President or to the Congress concerning general economic conditions, the state of competition and the degree of concentration in a given industry, together with suggestions for remedial legislation. Such general economic surveys are made in response to the request of the President, at the direction of the Congress, or upon the initiative of the Commission.

"(d) In the past, the economic and business facts developed by the Commission have contributed to the adoption of much remedial legislation, including the Stock Yards Act, the Securities Act, the Exchange Act, the Holding Company Act, the Revised Federal Power Commission Act, the Natural Gas Act, etc. In other cases, certain industries have voluntarily made changes in the conduct of their business following disclosures of uneconomic and harmful competitive trade practices.

"(e) This Bureau also furnishes general economic information, including industry-wide costs of

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[Footnote to the quotation.]

"1. Under the organizational nomenclature adopted by the Commission on November 3, 1947 (See footnote on page 43), the three Assistant Directors are Chiefs in the order named, of the Bureau's three divisions; namely, the Divisions of Accounting, Statistics and Financial Reports and Economics."

> production and of distribution and makes special reports to the Commission for submission to the President, the Congress, and to various government departments and agencies. The personnel of the Bureau includes accountants, economists and statisticians, and as a regular part of its work, members of its staff may be called upon to act as expert witnesses, to advise and consult with the Commission's attorneys, and to prepare accounting, economic, and statistical analyses in connection with legal cases. This is particularly true with respect to basing point and Robinson-Patman cases. The latter cases involve accounting and statistical problems particularly where differences in costs are used as a justification for price differences."

(Thus, *ante litam motam*, the Commission did not claim that Section 6 could be invoked in aid of the enforcement provisions of Section 5.)

7. The claim of the petitioner that the Commission's Rule XXVI(b) provides "for • • • *supplemental* reports of compliance"[13] is not textually supported by the said Rule, which refers *only* to "*further* reports"[14] [of compliance]. Nor is it now expressly asserted by the petitioner that its claim to recover a statutory forfeiture can be predicated upon or supported by that Rule. As the District Court below said:[15]

> "• • • The Commission also insists that Rule XXVI has nothing to do with Section 5 compliance reports, but is only in aid of economic survey reports under Section 6(b)."

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[13] Petitioner's Brief, p. 50.
[14] Petitioner's Brief, p. 65.
[15] Int. Salt, R. p. 59.

And the Court of Appeals below quoted from the Commission's brief below on this point as follows:[16]

> "• • • We note, however, the following statement from its quotation: 'This rule [XXVI] was promulgated under subsection (g) of Sec. 6 and implements the authority granted the Commission by subsection (b) thereof'. • • •"

## SUMMARY OF ARGUMENT

### I

The Federal Trade Commission Act is not one single, harmonious whole, but an emulsion of two quite different elements. Its primary and textually longer element is antitrust. Its second element, unfair competition, is to be found only in Section 5. This dichotomy has been recognized in many court decisions, and is also sustained both by the legal history of the enactment of the statute and also by an analysis of the internal provisions of the Act.

In consequence Section 5 is independent of the rest of the Act. Section 5 contains its own complete enforcement scheme. Section 6 deals with entirely different matters, and the forfeiture provision of the third paragraph of Section 10 refers only to Section 6(b), which is not applicable to the present case.

Therefore, after the Court of Appeals had rendered its final decree in 1943, retaining exclusive jurisdiction of this cause in order "to enforce compliance in every respect • • • and to prevent evasion thereof" the Commission could not, years later, proceed further in this cause, in enforcement proceedings directed directly against this respondent, quite independently of the Court of Appeals.

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[16] Int. Salt, R. p. 75.

## II

The Commission's purported 1947 order was invalid. It required what it variously styled as an "additional"; an "additional and supplemental", and a "supplemental", compliance report from this respondent. The order relied for its support on the Commission's Rule XXVI(b) which refers only to "further" compliance reports. Neither the purported order nor the Rule purport to correspond to the "special reports" of Sections 6(b) and 10, and thus the strict rules against forfeitures should be applicable here.

The Commission's purported 1947 order, together with its later orders, was made *ex parte*, without notice or hearing to this respondent, in violation of the Fifth Amendment.

Rule XXVI(b) cannot be supported by any express authority in the Federal Trade Commission Act, and the Commission has failed to comply with the requirements of the Administrative Procedure Act of 1946.

Indeed, although Rule XXVI(b) has existed since 1936, the Commission has never until now sought to give it the novel interpretation contended for by the Commission in the present case.

Notwithstanding, the respondent filed with the Commission its "further report in writing" before the commencement of the present case. The Commission may or may not be satisfied with the contents of that "further report", but it is neither accurate nor fair to claim that no report was filed. As Section 10 provides no forfeiture for filing a report claimed to be insufficient the strict rules against forfeitures should be applicable here.

## III

The Commission's rules, etc., did not purport nor lawfully permit it, in the disguise of requiring a purported report, to confiscate an expensive set of books, worth hundreds of dollars, without paying, or offering to pay, just compensation therefor.

Otherwise the respondent essentially complied with the Commission's order.

## IV

The power of the Commission to require an *original* compliance report under Rule XXVI(a) is *not* in issue here.

# ARGUMENT

## I

**The lower courts correctly held that after the Court of Appeals had made its final decree in 1943 in the proceeding under Section 5 of the Federal Trade Commission Act, the Commission had no statutory or lawful power, almost five years later, to require a subsequent report to enforce compliance with that Court's final decree.**

The Federal Trade Commission Act (hereinafter usually referred to for convenience as the Act), as has often been noted, is *not* one single harmonious whole. As ultimately enacted it is an emulsion of two quite different elements.

Such dichotomies are not uncommon in statutes. Thus this Court long ago noted that, in the cognate field of interstate commerce, the Hepburn Act of 1906 contained

"two matters * * * treated as different subjects and * * * dealt with in separate sections" with "no * * * necessary connection between them * * *." *Baer Brother Mercantile Co.* v. *Denver & Rio Grande R.R. Co.*, 233 U. S. 479, 487.

Such is the recognized and acknowledged duality of the Federal Trade Commission Act. Its larger and longer and original textual element is *antitrust*—that is, all of the Act (*except Section 5*) is *antitrust*."

Section 5 represents the other and newer element—the *unfair competition* element—which is *not antitrust*, because the littlest business enterprise may compete, and sometimes does compete unfairly.

One of the authors of the Appellant's brief below, the Commission's Associate General Counsel, the late Mr. Wooden, dwelt upon this fact of legal history in a speech which he delivered before the National Industrial Conference Board in New York City on November 23, 1948:—"The Future Relations Between the Federal Trade Commission and American Business." Mr. Wooden referred to the creation of the Bureau of Corporations in 1903 to aid in enforcing the Sherman Antitrust Act. He then said:

> "* * * That Bureau was the forerunner and became the nucleus of the Federal Trade Commission. * * *"

Mr. Wooden then referred to

> "* * * the *two* main lines specified by Congress in the original statute. *One* of those duties is

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[17] Thus it seems exaggerated for the Commission to claim (Petitioner's Brief, twice on p. 14), that its "primary" duty is under Section 5 "to police methods of competition in commerce." Indeed the Petitioner's Brief (p. 41) quotes Senator Cummins as saying that the new Commission is intended to strengthen the *antitrust laws "in the first instance."*

> similar to the work of the Bureau of Corporations, in that it is authorized to make *general investigations* of monopolistic trends and conditions and unfair practices. It reports the results of such studies to Congress for its guidance in legislation and to the public for its understanding of the facts. Such reports have provided the seed bed of such important legislation as the Securities and Exchange Commission Act, the Public Utilities Holding Company Act, the amended Federal Power Commission Act and the Natural Gas Act. Thus the Commission's exposure of dishonest, fraudulent and monopolistic conditions and practices has extended into *areas beyond those in which it has been given any corrective or remedial powers.* There is every reason why the Commission should be called upon in the future to exercise similar fact-finding functions." (Emphasis supplied.)

We think that this is a clear public admission by the Associate General Counsel for the Commission that that body lacks "corrective or remedial powers" in its general investigatory field.

The truth of this fact of legal history has been somewhat extensively noticed by the courts, and particularly so by this Court.

In *Federal Trade Commission* v. *Millers' National Federation*, 47 F. (2d) 428, the Court of Appeals said at page 429 (emphasis supplied):

> "The power of *investigation* conferred upon the Commission by Section 6 is different in character from the *jurisdiction* conferred by Section 5. Section 6 contemplates an investigation for the collection of facts for the information of Congress in aid of the exercise of its legislative function, or for the President in aid of recommending necessary legislation. * * *"

This Court has thrice spoken upon the topic. In *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, this Court said at page 434:

> "Many of the duties imposed upon the [Federal] Trade Commission had been theretofore performed by the Bureau of Corporations. *That which was in essence new legislation was the power conferred by §5.* * * *" (Emphasis supplied.)

And in *Schechter Corp.* v. *U. S.*, 295 U. S. 495, Chief Justice Hughes, writing for a unanimous court, noted at page 532 that Section 5's unfair competition provision "was an expression *new* in the law." On the next page (533), he noted that the Congress had, in consequence of that fact, "set up a special procedure," and that it had also provided, among others, "for *judicial* review to give assurance that the action of the Commission is taken within its *statutory* authority." (Emphasis supplied.)

In *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160, where the question involved was the submission of reports under Section 6, we think it plain that this court had the same facts of legal history in mind when it made the following distinction at page 170 (emphasis supplied):

> "Appellees were not charged with practicing unfair methods of competition (Section 5, Act of Sept. 26, 1914) or violating the Clayton Act (c. 323, Sections 2, 3, 7, 8, 38 Stat. 730, 731, 732). *Orders under such charges can be enforced only through a Circuit Court of Appeals* (Section 11, Clayton Act; Section 5, Federal Trade Commission Act).
>
> "*The action of the Commission* here challenged *must be justified*, if at all, *under* the paragraphs of *sections 6* and 9, Act of September 26, 1914, copied below, *and the only methods, prescribed for*

*enforcing orders permitted by any of these paragraphs are specified in Sections* 9 and *10*. They are applications to the Attorney General to institute an action for mandamus, and proceedings by him to recover the prescribed penalties."

So we submit that the District Court below was quite correct in following such precedents when it wrote:[18]

"When Congress enacted the Federal Trade Commission Act the duties and powers of the new Commission seem to have been divided into two categories. The first category continued the power of investigation and publicity with respect to corporations formerly lodged in its predecessor, the Bureau of Corporations, and now contained in Sections 6(a) and 6(b) of the present Act. However, Congress added a new section, Section 10, providing for a forfeiture of $100.00 a day for failure to file the reports provided for in Sections 6(a) and 6(b). The second category into which the duties of the Federal Trade Commission were divided was provided by Section 5 which prohibits unfair methods of competition and provides the method for its enforcement and penalties. • • •"

And we submit that the Court of Appeals below was likewise wholly correct when it said:[19]

"• • • It can be safely said, however, that such history discloses that Secs. [5] and [6] were not intended as complementary but were designed as separate and distinct, each directed to different situations. The dual purposes embodied in the two sections were recognized in F. T. C. *v.* Miller's National Federation, 47 F. 2d 428, 429, wherein the court stated: 'The power of investigation conferred

[18] Int. Salt, R. 56.
[19] Int. Salt, R. 73.

> upon the Commission by section 6 is different in character from the jurisdiction conferred by section 5. Section 6 contemplates an investigation for the collection of facts for the information of Congress in aid of the exercise of its legislative function, or for the President in aid of recommending necessary legislation.' See also F. T. C. et al. v. Claire Furnace Co., 274 U. S. 160, 170. * * *"

In the light of the foregoing judicial recognition of the legal history of the Act it would seem to be superfluous to set forth the Act's legal history, and to demonstrate the truth of that legal history by a textual analysis of the Act, were it not for the petitioner's insistence to the contrary.

When such problems of legal history and of statutory interpretation are presented, this Court has heretofore approved of what we shall attempt to do hereafter in this brief, of studying

> "* * * the external aids that are drawn from history * * * [and] another that may be said to be internal, the aid to be derived from the wording of related sections. * * *" *Norwegian Nitrogen Co.* v. *U. S.*, 288 U. S. 294, 315.

This study involves to a considerable extent the legislative history, analysis and interpretation of the provisions of Sections 5, 6 and 10 of the Act.[20] Although it will later be necessary to analyze and to interpret these sections we believe it will be helpful, first, to throw light on them through the aid given by examining the legislative history of their original enactment.

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[20] U. S. Code, Title 15, Sections 45, 46 and 50. For convenience's sake we shall refer to them as sections 5, 6 and 10, as does the petitioner's brief and the District Court below. The Court of Appeals used the code's numerals.

We quite agree with the petitioner that what is said in public debates is of dubious value (Appellant's brief below, pp. 34-35). We think that one or possibly two unconsidered expressions spoken in the course of such debates (Petitioner's brief, pp. 45-47), which petitioner has torn from the context of hundreds of pages of the Congressional Record have a value—if any—which is even more dubious.

But legal history has value; considered, well-reasoned, printed committee reports have value; and surely additions to, or omissions from, the text of the proposed Act may be extremely significant. We hope that this Court, like the Courts below, may find our research into such legislative history to be useful and of help to it in the performance of its task.

### A. Preliminary General Legal History.

The Act of February 14, 1903, established the Department of Commerce and Labor; 32 Stat. L., Vol. 1, Chap. 552, p. 825.

Section 6 thereof (*ib.*, p. 828) provided for the creation within the Department of Commerce and Labor of a Bureau of Corporations, to be headed by a Commissioner of Corporations. His powers were

> "to make * * * investigation into the organization, conduct, and management of the business of any corporation * * * engaged in commerce * * * excepting common carriers subject to 'An Act to regulate commerce' * * *.
>
> "* * * to gather, compile * * * information concerning corporations * * *."

*(This is essentially the present phraseology of Section 6(a) of the Federal Trade Commission Act.)*

The Commissioner of Corporations was given the same subpoena power, and the same power to investigate, as were conferred upon the Interstate Commerce Commission. However the original statute of February 14, 1903, contained no provisions for forfeitures, fines, penalties or other punishments.

For present purposes it is not necessary to trace the vicissitudes or the history of the Bureau of Corporations under the first President Roosevelt, nor to outline the political positions of the Republican Party, the Democratic Party and the Progressive Party concerning "trusts" and corporate combinations, during the 1912 Campaign. These matters appear at length in an excellent book by Mr. Gerard C. Henderson, "*The Federal Trade Commission*", at pages 16-17, and 19-20.

However, after the election of President Wilson, there was passed a Senate Resolution, #98, appointing a Committee to look into the question of the combinations of large corporations, then popularly described as "the Trusts". Under date of February 26, 1913, and pursuant to this Senate Resolution #98, a report was made to the Senate by the Committee on Interstate Commerce; Senate Report #1326, 62nd Congress, Third Session. In this report the *first* recommendation, to be found at page 12, is that the existing Bureau of Corporations be converted into an independent commission, so as to gather

> "more complete and accurate knowledge of the organization, management, and practices of the corporations and associations engaged in national and international commerce than we now have."

The two further recommendations of the Committee were that this proposed Commission (then tentatively

named the Interstate Trade Commission) should, *second*, act with greater promptness in passing upon the legality of corporate combinations in restraint of trade, and, *third*, assist the courts in dissolving any corporate "trust" combinations found to be unlawful under the *antitrust* statutes.

Various hearings were held thereafter and various bills were introduced in the Senate and in the House of Representatives.

Only three among these bills need be mentioned here, viz.:

i. House of Representatives, Bill #15,613, passed by the House (the *first* bill);

ii. Senate Bill #4160, later passed by the Senate (the *second* bill); and

iii. The final compromise bill, which was enacted into law as the Federal Trade Commission Act of September 26, 1914.

Senate Report #597, 63rd Congress, Second Session, to accompany H.R. #15,613, is a report in which the Senate Committee on Interstate Commerce reported the Senate's bill, #4160 (the text of which was printed in full) as a substitute for H.R. #15,613.

As appears from this report, at pages 22 and 23, the guiding idea was the same as the *first* recommendation of the Interstate Commerce Committee report of February 26, 1913, *supra*, namely, that the new Commission should be created primarily for investigation, publicity, and making recommendations to the President and to the Congress.

Hence, as recommended by the Interstate Commerce Committee report, the old Bureau of Corporations was to be taken over lock, stock and barrel.

Such also were the ideas of Mr. Herbert Knox Smith, then the Commissioner of Corporations (the head of the Bureau of Corporations) as set forth in a letter published in this Senate Report #597: see page 28 thereof especially.

In the Senate Report #597, under the topic caption which appears on page 11, viz.: "Powers of Investigation and Reports", the report states, almost at the top of page 12 (emphasis supplied):

> "It will be seen that while large powers of investigation are given, they are not greatly in excess of those possessed and for years exercised by the Bureau of Corporations. *Reports* are required *only* from such corporations or classes or corporations as may be designated by the Commission. There are over 350,000 corporations in this country, of which perhaps a large proportion may be engaged in interstate trade, but it must be realized that *the number affected by the proposed legislation will not exceed 1,000.*"

Thus, even when the *second*, or Senate, bill was being introduced and reported on, the primary emphasis was on the *antitrust* investigatory powers, which were to be extremely limited.

## B. Specific Legal History.

### 1. Of Section 6(a)—(antitrust).

In the Senate Bill #4160, Section 3 corresponds to the present Section 6 of the Act.

As will appear from another report, to be mentioned hereinbelow, Senate Bill #4160, by Section 3, subdivision (a) (the *same* as Section 6(a) of the present Act) was not attempting to create a novel investigatory power more

sweeping than that which was then possessed by the old Bureau of Corporations.

The first bill, drafted by the House of Representatives, (H.R. #15,613) throws a clear light upon the intention of both houses of the Congress in this respect. The H.R. bill's Section 3 was followed by the Senate when it prepared the second bill. Thus Section 3 of each bill corresponds to the present Section 6, and in its Section 3 the House Bill had simply incorporated the investigatory powers of the old Bureau of Corporations by reference to the original statute of February 14, 1903 (H.R. Report #1142, 63rd Congress, 2nd Session, page 11).

The conferees of the Senate and of the House of Representatives which agreed on the third, or compromise, or final, bill thought it to be a matter of better draftsmanship not to incorporate the old powers by a mere reference to the 1903 Statute, but, rather (in their own words),

> "Instead of transferring them [the old powers] by reference to the original act"

to have them "explicitly set out in Section 6, paragraph (a)" of the redrafted bill. (H.R. Report #1142, 63rd Congress, 2nd Session, page 18). Accordingly, this was done in the third or final bill.

Mr. Henderson therefore correctly concludes (*The Federal Trade Commission*, p. 45), in the light of the foregoing clear declaration of the intention of the Congress, that

> .... In general, these [powers] were analogous to the powers of the old Bureau of Corporations; they were an aid to legislation and to the formation of public opinion, *but had no direct relation to the enforcement of the law.*" (Emphasis supplied.)

The use of only the word "corporations" in the draft of what became Section 6, when viewed in the light of Section 5, indicates that the confines of the Bureau of Corporations were being respected in the minds of the draftsmen of the new act. From this it would seem clear that the superimposition of a power to obtain "annual or special reports" upon the existing statutory framework, lifted and copied from the Bureau of Corporations, merely represented an enlargement of the *means* of carrying on general economic and *antitrust* investigations of corporations rather than the creation of a new species of general enforcement power.

Especially is this conclusion strengthened when the court bears in mind that *Section 5 was not created until after the first bill in the House and the second one in the Senate had been drafted.*[21]

**2. Of Section 6(b) and Section 10 (third paragraph)—(antitrust).**

In the *second*, or Senate Bill, #4160, Section 3(b) (the *same* material as Section 6(b) of the present Act) the ultimate phraseology of the present statute, "by general or special orders" and "annual or special, or both annual and special, reports of answers in writing to specific questions" did not originally appear.

However, part of its essence appeared in embryo form in the next subparagraph (Section 3(c)) which provided for "a uniform system of annual reports from such corporations or classes of corporation • • • as the commission may designate", and authority was also conferred therein on the Commission to require a special report.

In the *third*, or final bill, most of the essence of subdivision (c) was combined into subdivision (b).

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[21] Int. Salt, R. 75.——

The House's *first* bill had covered this same subject matter in its Section 9, which contained two paragraphs, both unnumbered. The first unnumbered paragraph required all corporations engaged in commerce, having a capital of over five million dollars, or, having a less capital, belonging to a class of corporations designated by the Commission, to make annual reports. These annual reports were to be routine and compulsory, not discretionary. In addition, the Commission was given discretionary authority to "require such special reports as it may deem advisable." The second unnumbered paragraph of Section 9 of the *first* bill provided the new $100 a day forfeiture for failure to file annual or special reports (now constituting the third and unnumbered paragraph of Section 10 of the present Act) in phraseology the essence of which was later copied in the Senate's second Bill, #4160.

This juxtaposition in the *first*, or House Bill, #15,613, of the report power with the $100 a day forfeiture provision in one single section, Section 9, is of great significance, because it offers very persuasive evidence that this forfeiture provision was intended by the Congress to be applicable *only* to these particular report powers of the new Commission when exercised under Section 6(b).

Nor does the form of the Senate, or *second*, bill cast any doubt upon the foregoing fact. The Senate also had provided for the $100 *per diem* forfeiture, but in a separate section, Section 6 of the Senate's bill. However, that Section of the Senate's bill specifically referred back to the earlier report paragraph in the Senate's bill (now Section 6(b) of the Act) and, in phraseology essentially identical with the third paragraph of the present Act's Section 10, made the forfeiture provision specifically ap-

plicable solely to failure to file the annual or special reports provided for in the earlier investigatory Section of the Senate, or second, bill.

After the third, or compromise, bill had been prepared, the conferees of the Senate and the House of Representatives explained in their report (H.R. Report #1142, 63rd Congress, 2nd Session, page 18), with reference to the routine and compulsory requirement of the annual reports contained in the House's original, or first, Bill, that they thought it better not to compel the routine making of such annual reports, by certain defined corporations, but rather to leave the matter of requiring *any* such reports "to the discretion of the commission." In logical consequence they also removed from the third bill the provision of the House Bill which had required such routine reports only to be made by corporations, engaged in commerce and which had a capital of over five million dollars, or, having a less capital but belonging to a class of corporation which the Commission might designate.

### 3. Of Section 6(c)—(antitrust).

That the Commission was *not* to be given any novel or general law enforcement powers under this investigatory Section 6(b) is further demonstrated by the history of yet another section of the second Bill. The present Section 6(c) is concerned with *investigation* of corporate compliance with *antitrust* decrees. But in the Senate's second Bill #4160, where the corresponding material is to be found in Section 3(f), and where both the present Act and the Senate's second Bill run, essentially identically, "• • • of the manner in which the [order or] decree has been or is being carried out" the Senate's bill as

originally presented contained the following additional matter immediately following, viz.:

> "and as to whether the same has been or is being violated, and what, if any, further order, decree, or relief is advisable."

This last quoted material concerning enforcement powers was stricken out of the second bill prior to the final enactment of the law. It indicates very clearly the strict purpose of the Congress to make the entire Section 6 investigatory only.

Furthermore, in Senate Report #597, 63rd Congress, 2nd Session, under the separate topic caption "POWER TO AID THE COURTS" it is nowhere remotely suggested that the Commission was given any enforcement powers under the investigation section, Section 6. Instead, it is twice stated merely that the Commission should "report its findings * * * to the Attorney General."

The reason for this is historical and is clearly explained in the Committee Reports. The historical reason is that these investigations were directed against the great corporate combinations, or "trusts", and the familiar remedy customarily employed by the courts in those days (just as it has been recently employed against holding companies) was to decree the dissolution of these corporate combinations—or, as Senator Newlands artlessly phrased it (petitioner's brief, p. 46)—"a decree of disorganization."

Accordingly, it is stated (H.R. Report, #1142, 63rd Congress, 2nd Session, page 18), that the present Section 6(c) was intended to meet situations where a court had decreed the dissolution of a "trust" resulting from the combination of earlier corporations. It was believed that

the Commission might be of some help in ascertaining how such an *antitrust* dissolution was working out.

What has been said so far has had to do with the *antitrust* investigatory powers of the new Commission. Indeed, the original statute deals almost exclusively with *antitrust* investigatory matters. Essentially there is only one section of the Act which is not directly or indirectly investigatory and *antitrust* in its nature, and that is Section 5.

#### 4. Of the new Section 5—(unfair competition).

There was also some discussion in 1914 about making a change in the substantive antitrust laws. The pros and cons of that debate are not material here, except to observe that in the end no substantive change was made in the antitrust laws.

Instead, a new and different idea of substantive law, the concept of unfair competition, emerged.

There was and is no integration between the *antitrust* concept of monopoly, and the new concept of *unfair competition*. And here is the intrinsic dichotomy:

Speaking practically, only a very big[22] corporation can monopolize, or dangerously attempt to monopolize, some business activity and thus fall foul of the *antitrust* laws.

But a single individual, or a partnership, or a small corporation—any little[23] business enterprise of any kind—can engage in *unfair competition*.

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[22] In the years since 1914 the *antitrust*, or monopoly, cases have almost invariably involved big, nationally known, corporations. *No* antitrust case brought *only* against natural persons, or partnerships, comes to our mind or memory.

[23] But in the years since 1914 the Commission's records are replete with many *unfair competition* proceedings brought against natural persons, partnerships, and small, relatively unknown, corporations.

And, as it were at the eleventh hour, this new concept of unfair competition was patched[24] into the already existing draft of the Federal Trade Commission Act. In consequence it is wholly self-contained, and it is to be found in its entirety within one single section—Section 5.

With respect to Section 5, which appeared in the *third*, or final, bill, it was stated by the Managers for the Senate and for the House of Representatives (H.R. Report, #1142, 63rd Congress, 2nd Session, page 18) that Section 5 dealt with "unfair methods of competition * * * and empowers the commission, after hearing, to order the discontinuance of the use of such methods."

The prior and unquestionably *antitrust* laws could be enforced only in the courts, both then and now.

The Managers clearly advised both the Senate and the House of Representatives—doubtless by analogy to the familiar procedure of the unquestionably antitrust laws—that likewise in all matters involving the new Section 5 the Commission could not enforce its orders except through the courts. Their statement (H.R. Report #1142, 63rd Congress, 2nd Session, page 19) follows (emphasis supplied):

> "*The orders of the commission will be enforceable only through the courts.* In order to obtain the speediest settlement of disputed questions, it is provided that the commission shall apply for the enforcement of its orders directly to the circuit court of appeals. * * * *The judgment of the circuit court of appeals will be final*, subject only to review by the Supreme Court upon writ of certiorari.
>
> "This section is entirely new to the House bill, but it appeared in a somewhat similar form in the

[24] Int. Salt, R. 75.

Senate bill, and the managers on the part of the House believed it wise to accept the provision in the form in which it now appears."

**3. In Conclusion—resumé of the two categories.**

We think the foregoing legal history has made it clear that when Congress enacted the Federal Trade Commission Act, it specifically divided the duties and powers of the new Commission into *two* quite separate categories.

Historically, the *first* category was the pre-existing power of investigation and of publicity in *antitrust* matters—essentially a mere continuance of the former powers of the old Bureau of Corporations, but added to a portion of this old *antitrust* power, under Section 6(b), was the new $100 a day forfeiture provision, which is now to be found in the third unnumbered paragraph of Section 10 of the Act.

The *second* and quite different category of power granted to the Federal Trade Commission, almost as an afterthought, was the wholly new *unfair competition* power. It appeared only in Section 5 of the new Act, and it also was wholly self-contained within that single section, both as to its enforcement and penalties. And one must never lose sight of the fact that, in the words of the Managers' Report, the cease and desist orders of the Commission under this new Section 5 were to be "enforceable *only* through the Courts." And the Court's judgment was to be "*final.*"

## C. Textual Analysis of the Sections Involved.

A textual analysis of the Act, with particular emphasis upon Sections 5, 6, and 10, leads, we submit, with equal clearness to the same conclusion as was reached by both of the courts below. We respectfully present such an analysis for the consideration of this Court.

### 1. Section 6—The Old Antitrust Investigatory Section.

Section 6 provides only for the *antitrust* investigatory powers and duties of the Commission, and confers them *only* with respect to *corporations*, as has already been intimated.

Sections 5 and 6 are textually wholly independent of each other, as will be further discussed below. Section 5 does not anywhere refer to Section 6. No reference is made anywhere in Section 6 to Section 5. And, as will be shown, Section 6 is wholly investigatory and antitrust, and contains nothing having to do with the enforcement of cease and desist orders in unfair competition cases.

a. Subsection (a) of Section 6 gives the Commission power

> "To gather and compile information concerning, and to investigate * * * the organization, business, conduct, practices, and management of any corporation * * * and its relation to other corporations and to individuals, associations and partnerships."

This phraseology was derived practically verbatim from Section 6 of the Act of February 14, 1903, the old Bureau of Corporations, as has already been stated above.

There are *three* requirements ~~which~~ must be observed by the Commission if it is to claim any antitrust power under this subsection. First, its purpose must be solely to gather and compile information, or to investigate the affairs of the corporation involved. Second, such investigatory proceedings must involve only a corporation. Unlike Section 5, persons and partnerships cannot be the subject of a Section 6, subsection (a) investigation for the historical reasons already told. Third, the affairs of a corporation can be investigated only as those affairs relate to *other* corporations, individuals, etc. The individual

activities of a corporation as such, separately and *in vacuo* cannot be independently explored.

Finally, it should be noted that subsection (a) does not specifically impose any duty upon any corporation (or corporate officer) to give any information to the Commission.

b. Subsection (b) of Section 6 gives to the Commission the power

> "To require, by general or special orders, corporations, * * * or any class of them, or any of them * * * to file with the Commission * * * annual or special, or both annual and special, reports or answers in writing to specific questions * * *."

which will inform the Commission regarding the business affairs of those corporations, and the "relation" thereof "to *other* corporations, partnerships and individuals * * *."

For the Commission to exercise antitrust power under this subsection, there are *four* requirements. First, the Commission must enter a general or a special order. Second, (and again unlike Section 5) only corporations can be proceeded against. Third, only annual or special reports, or answers in writing to specific questions, can be demanded. Fourth, those reports or specific questions can concern only the general affairs of a corporation in its "relation" to others. *No power is conferred to exact gifts of expensive books.*

We shall continue below a further discussion of this subsection.

c. Subsection (c) of Section 6 gives to the Commission the power to make an investigation of compliance

with *antitrust* decrees, and, upon request of the Attorney General, it has the duty to make such an investigation in such cases.

This subsection is significant because (1) it contains the *only* language in Section 6 which refers to the Commission's investigation of corporate combination with *any* court decrees already entered; and (2) its limited language pertains solely and specifically to Department of Justice litigation in the name of the United States, under the *antitrust* laws, resulting in a final court decree. Most significantly, it omits any reference to compliance with the Commission's cease and desist orders under Section 5.

(It is obvious, therefore, that any power over enforcement proceedings, or the investigation of compliance with the Commission's cease and desist orders under Section 5, or of the Circuit Court's ensuing decrees, must be sought for solely and wholly in the provisions of Section 5.)

d. Subsections (d) and (e) of Section 6 refer to the duty of the Commission to investigate alleged violations by corporations of the *antitrust* laws, at the instigation of the President, the Congress, or the Attorney General, as contrasted to investigations of the same sort made on the Commission's own motion. Again (unlike Section 5), these subsections refer only to alleged corporate violators.

e. Subsection (f) of Section 6 refers to the publication of information generally, and to the making by the Commission of annual and special reports to the Congress with respect to the information obtained by it.

Subsection (f) then, is likewise clearly consistent with and gives further proof of, the single and logical antitrust purpose covered by Section 6—to obtain informa-

tion of a general nature, concerning corporations only, for the guidance of other branches of the government, but not to empower the Commission to require information looking toward the enforcement of any court decree or of any of the Commission's cease and desist orders already entered—except a court's final decree in one special kind of an *antitrust* case.

f. This conclusion is further fortified by subsection (h) of Section 6, which provides for the investigation of trade conditions in and with foreign countries, as affected by combinations, etc., and for consequent reports and recommendations to be made by the Commission to the Congress.

To the same effect Professor Beer (*Federal Trade Commission Proceedings*) writes at pages 15-16:

> "Under Section 6, the Commission has conducted many worth-while and valuable studies into various aspects of our economic structure, and these reports of the Commission have furnished much helpful and indispensable information to the Congress and the business world and have resulted in the enactment of remedial federal statutes."

And rather recently, in *Humphrey's Executor* v. *U. S.*, 295 U. S. 602, this Court noted at page 624 that Section 6 of the Act created "wide powers of investigation" under which the Commission "must report to Congress with the recommendations. Many such investigations have been made, and some have served as the basis of congressional legislation." This Court, which had just previously mentioned and analyzed Section 5, did not intimate that there is any interrelationship between Section 6 and Section 5. The same is true at page 628, where this

Court returns again to mention both Sections 5 and 6, and says of the latter section:

> "• • • In making investigations, and reports thereon for the information of Congress under [6], in aid of the legislative power, it acts as a legislative agency. • • •"

### 2. The Commission's Own Interpretation of the Nature of Section 6.

The interpretation which we have given to Section 6 of the Act is entirely consonant with the Commission's own interpretation during the approximately thirty-four years which have elapsed since the Act was passed.

It is also consonant with the official description which the Commission has set down in its own officially published statement concerning its own "Organization, Procedures, and Functions" as required by the provisions of the Administrative Procedure Act. The material to which we are about to refer was published in a pamphlet prepared by the Commission, dated November 20, 1947, and numbered Section 17.[25]

Under the caption "GENERAL ECONOMIC SURVEYS AND REPORTS" the Commission refers for the source of its power *only* to Section 6 of the Act. It states that "These functions of the Commission are performed by its Bureau of Industrial Economics".

The Commission further states, "The administration of this Bureau is conducted by a Director who is also the Chief Economist, and by a Chief Accountant, a Chief Statistician and an Assistant Chief Economist who are Assistant Directors of the Bureau."

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[25] Section 17 is printed in full, above, at pages 7-9.

The very name of this Bureau of the Commission and the titles of the various higher officials in this Bureau, all of whom are concerned only with Section 6 of the Act, repel the possibility of advancing any serious claim that the legal problems incident to the enforcement of a cease and desist order are committed to their charge.

Indeed, with obvious reference to Section 6(e) of the Act, the Commission states, under the aforesaid caption, that its concern with a final decree entered against a corporate defendant "*under the Antitrust Acts*" is, *first*, "*to ascertain* and report the *economic* effects of such decree • • •." The Commission then refers to "these general economic surveys" and states that their purposes "are to ascertain and report the facts to the President or to the Congress concerning general economic conditions • • •." It is further stated that "Such general economic surveys are made in response to the request of the President, the direction of the Congress, or upon the initiative of the Commission."

The Commission then refers with pride to "the economic and business facts" which it has developed and it states that it has disclosed "uneconomic • • • practices."

The Commission further states that its Bureau of Industrial Economics "also furnishes general economic information" and that it prepares "economic, and statistical analyses • • •." The personnel of this Bureau is said to include "accountants, economists and statisticians • • •."

This forthright acknowledgment that the statutory language pertains to reports incidental to general *economic* investigations does not assist the Commission's present claim that investigations ancillary to a prior cease and

desist order and in aid of its enforcement are permitted by the same Rule Section 17 and may also be demanded by its Division of Compliance for that purpose. Such a Rule could hardly be permissive of both. Investigations to acquire data as a basis for the formulation of economic or statistical reports or policies are not only necessarily distinguished, but also comprise a species differing vastly, from those which constitute a preliminary step in the enforcement process.

Nowhere in these official references to the work of the Commission under Section 6 is there any mention made of compliance or enforcement proceedings, nor is any reference to be found to the Division of Compliance, whose duties as to "Compliance and Enforcement" of final cease and desist orders under Section 5 will be discussed hereinbelow. The latter are published and described by the Commission in an entirely different procedural section.

For many years the Commission itself has confined its application and interpretation of Section 6 to general economic and antitrust surveys, which is a delegated *legislative* function. To attempt now, at this late date, to transform such authority into an alleged established practice necessary to the enforcement aspects of the Commission's activity is certainly of questionable validity, to put it mildly.

The prior policy statements of the Commission have consistently confined its claimed powers under Section 6 to the area of economic and antitrust surveys. Thus, the Commission's Annual Report for 1932 (pp. 1-4) said of Section 6:

> "In pursuance of Section 6 the Commission conducts general investigations at the request of the President, either house of Congress, and the Attor-

> ney General, and makes reports in aid of legislation and in regard to alleged violations of the antitrust act."

Similarly, in 1940, while describing an economic survey (Annual Report of the Federal Trade Commission for 1940, pages 17-18), the Commission said:

> "* * * A Commission resolution * * * authorized the periodic collection of annual or special reports * * * all in accordance with the powers * * * in section 6 * * *. The information is to be compiled with a view to developing and publishing the significant facts regarding the general trend of, or change in, the economic situation * * * essentially a factual presentation of basic industry data."

From these illustrations of the Commission's own declarations, it does not appear that in the past the Commission has ever believed Section 6(b) to be inclusive of the power here sought to be asserted. Always heretofore the Commission has consistently declared that economic and antitrust surveys are the varieties of investigation contemplated by Section 6.

It is of considerable importance to note that, nearly a quarter of a century ago, the Federal Trade Commission was advised at its own request by the Attorney General of the United States that the provisions of Section 6(b) are precedural and add nothing to the power to undertake investigations conferred by Sections 6(a) and 6(d). Furthermore, in this opinion the Attorney General of the United States held that such investigations as the Commission might make must be strictly confined to alleged violations of the Antitrust Acts by corporations. We refer to an opinion dated October 24, 1925, which is to be found

in Volume 34 of the Official Opinions of the Attorneys General of the United States, commencing at page 553.

Under four designated resolutions of the United States Senate the Federal Trade Commission had been requested to conduct certain investigations. Thereupon the Commission wrote to the President, asking certain questions as to its powers of investigation under Sections 6(a), (b), and (d) of the Act. The President transmitted this inquiry to the Attorney General, who thereupon expressed his opinion as to the scope of these investigatory powers.

The material parts of the Attorney General's opinions are as follows. At pages 557-558, he stated:

> "A *main* purpose of the Federal Trade Commission Act was to enable Congress, through the Trade Commission, to obtain full information concerning conditions in industry to aid it in its duty of enacting legislation. That purpose was emphasized in the proceedings attending the passage of the Act (S. Rep. 583, 63d Cong., 2d sess., S. Rep. 597, 63d Cong., 2d sess.); and in the debates the Commission was sometimes likened to a Committee of Congress (statement by Congressman Stevens, 51 Cong. Rec. 14935).
>
> "Resolutions directing investigations pursuant to section 6, subsection (d), are to be limited in their scope to the ascertainment of facts which reasonably and logically tend to show whether or not the *Antitrust* Acts are being violated by any *corporation*. The existence or nonexistence of a violation of such acts may be disclosed by acts committed by the *corporations* under investigation and the effect of such acts upon interstate trade and commerce. The investigations should not in any case be enlarged to include an inquiry into any matter which does not have a direct bearing upon

the question whether interstate trade and commerce are being unlawfully monopolized or restrained." (Emphasis supplied.)

At page 563 the Attorney General expressed the opinion that the powers of the Commission were quite limited, saying:

> "There is serious question, however, as to the requirement that the Federal Trade Commission shall ascertain and report the efforts, if any, made by the corporations in question, through the expenditure of money or through the control of avenues of publicity,
>
> "'to influence or control public opinion on the question of municipal or public ownership of the means by which power is developed and electric energy is generated and distributed.'
>
> "The relationship of such facts, assuming their existence, to a charge of violation of the *antitrust* acts is not apparent. Indulging all presumptions in favor of the validity of the resolution under the Organic Act, I am still unable to find authority for such an inquiry. All other features of the investigation properly may be made." (Emphasis supplied.)

Towards the conclusion of his opinion, the Attorney General expressed the following further opinions as to the limitation of the investigatory powers of the Federal Trade Commission under Section 6:

> "You will recognize that I can not forecast all of the problems which may arise in carrying out the somewhat vague directions of the resolutions. Minor questions as they arise should be resolved by the Commission in the light of the principles

> set out in this opinion. The test whether or not a particular line of inquiry should be followed would seem in each instance to be whether it will disclose material evidence of a violation of the *antitrust* acts." (Emphasis supplied.)

and, most important of all:

> "The provisions of [Section 6] subsection (b) are procedural and add nothing to the power to undertake investigations conferred by subsections (a) and (d)."

Because this opinion was sought by the Commission from the Attorney General, and because the Commission for almost a quarter of a century thereafter and until the present time has limited its own conduct and exercise of its investigatory powers under Section 6 to the limited scope advised by the Attorney General, we submit that this opinion is of the greatest importance, and that it supports and reinforces the correctness of the statutory interpretation expressed by the courts below as to the narrow scope of Section 6.

Perhaps the strongest argument against the Commission's novel claim that its rule-making authority extends to all sections of the Act finds an illustration in the legal history of Section 6(a) of the Wool Products Labeling Act of 1939. That section provided in the first instance that the Wool Act is to be enforced by the Commission under the rules, regulations and procedures provided for in the Federal Trade Commission Act. However, a later paragraph within the section indicates that the draftsman entertained a doubt as to its breadth, reading:

> "* * * the Commission is authorized and directed to make rules and regulations for the manner and

> form of *disclosing information* required by this Act, * * * and to make such further rules and regulations under and in pursuance of the terms of this Act as may be *necessary* and proper for administration and enforcement." (Emphasis added.)

Why was this additional grant of power deemed necessary?

Proponents of the Wool Act desired the power to compel affirmative disclosures relative to the subject matter falling within the ambit of that Act's administration. (Compulsory disclosure is also the essential feature of compliance reports.)

Therefore, it would appear that the rule-making authority contained in Section 6(g) of the Federal Trade Commission Act was deemed inadequate for the purposes of the Wool Act. Otherwise, the added grant in the Wool Act would not have been urged or required.

The fact that the rule-making power of the Federal Trade Commission Act springs from a subsection to a provision dealing with antitrust powers of investigation, and used historically by the Commission only in connection with general economic investigations, presumably created a fear in the mind of the draftsman of the Wool Act that the application of Section 6(g) was limited to the area covered by Section 6. But the opponents of the measure expressed a contrary belief; *i.e.*, that the "rules, regulations and procedure" of Section 6(g) of the Federal Trade Commission Act were sufficient.

The Wool Act as it stands was passed in the face of such opposition. (84 Cong. Rec. 9657.) From this legal history we conclude that the rules of practice emanating from Section 6(g) are confined to matters falling within the scope of Section 6, notwithstanding the words

"* * * for the purpose of carrying out the provisions of this Act."[26]

Another basis for limiting this seemingly broad language lies within the terms of subsection (g) itself. "From time to time to classify corporations * * *" would seem to be intended to qualify the words "and to make rules * * *" especially when this Court remembers that the final Congressional purpose of classifying corporations was to obviate unnecessary routine annual reports, and facilitate an adequate means of *antitrust* surveillance in order, *inter alia*, to apprise Congress of economic facts and to enable the President to recommend legislation. Thus, subsection (g) would appear to be akin to and contemplative of the general economic activity attributed by all the previous authorities to Section 6. Why, then, should the remainder of the sentence "* * * and to make rules * * *" be treated as an entirely disconnected and illogical grant of general power, when otherwise Section 6 and its subsections constitute a well-integrated and logical entity?[27]

In conclusion, it might also be mentioned that the Commerce Clearing House Reports, Volume 3, concerning Federal Trade Commission investigations, publish the releases of the Commission regarding its general economic

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[26] The petitioner asserts, citing four cases (brief, p. 51), that three courts have sustained a general rule-making power under section 6(g). But an examination of those cases shows that in no instance was there a challenge to the *power* of the Commission to make general rules. Therefore each Court assumed the existence of such a power, in the absence of any such challenge. We submit that what those courts said, *en passant*, was tantamount to dictum.

[27] As the court below pointed out, Int. Salt, R. 75, when section 5 was patched into the Act, the draftsman overlooked the word "Act" in section 6(g), and "there was a failure to remove or modify" that word.

investigations and its general investigations regarding possible antitrust violations. In these releases in which specific reference is made by the Commission to the law, reference is always made to Section 6 of the Act. There is no release published therein of *any* investigations made, either purportedly under Section 6, or under any other section of the Act, which involve either alleged violations of a Commission's cease and desist order under Section 5, or of a Court of Appeals' ensuing decree.

**3. Section 5—The New Unfair Competition Section.**

a. Consistent reference is made throughout all subsections of Section 5 to "persons, partnerships, or corporations." This is in contrast to Section 6, where consistent reference is made exclusively to "corporations", but never to "persons, partnerships, or corporations." The reason for this is historical, as has been demonstrated.

b. Subsection (b) of Section 5 describes the jurisdiction and procedure pursuant to which the Commission may prosecute acts involving the unfair methods of competition prohibited by subsection (a).

The last two sentences of subsection (b) are extremely significant in establishing the final nature of the Court of Appeals' ultimate decree. Those two sentences make it entirely clear that the Commission may, on due notice and hearing in the manner prescribed, "modify or set aside, in whole or in part, any report or any order made or issued by it under this section" at any time *until* the transcript of the record in any given case has been filed in a court of appeals in connection with an appeal by a respondent against whom a cease and desist order has been entered.

In other words, the freedom of the Commission to do as it will with its own cease and desist order (except for due procedural requirements) is unrestricted up to the moment when a court of appeals has obtained jurisdiction by the filing of a transcript on appeal. Such power then terminates: Beer, *Federal Trade Commission Proceedings*, p. 428.

This restriction on the power of the Commission, because of the *finality* then to be attributed to its order, is further emphasized by subsections (g), (h), (i) and (j) of Section 5, which subsections deal with various possible procedural variations in order to fix the point of time of the *finality* of a Commission cease and desist order. In none of those subsections except in (g)(1), when there has been *no Court order*) is there a reservation of any power to the Commission to do anything with its cease and desist order once that order has become *final* as therein severally provided.

c. Subsection (c) of Section 5 provides the appellate procedure available to a respondent against whom a cease and desist order has been entered. That subsection is replete with jurisdictional language, and that language speaks in terms only and always of Court jurisdiction and not of Commission jurisdiction. The following examples are important:

> "Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and

> to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors *pendente lite*."

This language, in the case of a judicial affirmance or modification, obviously contemplates the possibility of a claim concerning the dual existence of (1) a subordinate affirmed (or modified) cease and desist order of the Commission, and (2) of a separate and superior decree of the Court. Because of this conceivable theoretical duality the enforcement language was clearly intended to lay at rest in advance any such conflict. The legal survivor is the Court's decree alone:

> "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission."

This sentence concerning the monism of the Court's own final order is followed by a retrospective passage of draftsmanship which contemplates possible procedure during the antecedent hearing—a provision for taking additional evidence upon that hearing. It should, however, be noted that, even in such an event, once the Court has acquired jurisdiction, its jurisdiction is *exclusive*. This is necessarily so because of the statutory provision that the party desiring to adduce additional evidence, be it the Commission or the respondent, must first obtain leave of the Court for such additional evidence to be taken by the Commission, but only as an arm of the Court, and only on such terms and conditions as the Court, not the Commission, may prescribe. And while in connection with adducing such additional evidence, the Commission

may modify its findings or make new findings, and may make—note this carefully limited word—"its *recommendation*, if any, for the modification or setting aside of its original order", the Commission is not empowered, even under such circumstances, to modify or set aside its original cease and desist order. Only the Court has such power, because the Court has exclusive jurisdiction.

Clearly, therefore, the Court's jurisdiction is exclusive. Clearly, therefore, once the Court's jurisdiction has attached, the Commission's jurisdiction is *functus officio*.

The foregoing conclusion is, finally, buttressed by the plain phraseology with which this subsection concludes. The last sentence of subsection (c) provides explicitly that the decree of the court of appeals "shall be final," except when this Supreme Court on *certiorari* may change it.

d. Subsection (d) of Section 5 provides that

> "The jurisdiction of the circuit court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive."

It was the purpose of the Congress in enacting subsection (d) to emphasize the position for which the respondent contends, that "The jurisdiction of the circuit court of appeals * * * to * * * enforce, [or] modify * * * orders of the Commission [is] exclusive."

And we respectfully urge, that this single subsection (d) of Section 5 is in itself conclusive and decisive of the present dispute, as we think the Courts below correctly held.

In consequence, we submit that the Commission had no power to modify or to attempt to enforce its original

cease and desist order of 1943, independently of the Court of Appeals.

And in final consequence, we submit that the lower Courts correctly held that no District Court had any jurisdiction over this forfeiture case, because the enforcement jurisdiction of the Court of Appeals is "exclusive". Cf. Beer, *Federal Trade Commission Proceedings*, pp. 418, 428, 429.

e. Subsection (l) of Section 5 was not in the original Act. It also deals with the *finality* of a cease and desist order under the new procedural provisions of 1938. It provides that each violation of a cease and desist order "after it has become final," shall entail a civil penalty of $5,000.00, to be recovered in a civil action brought by the United States. In this connection, Section 16, also new in 1938, provides that where a "person, partnership or corporation" is liable to such a penalty, in the opinion of the Commission, the Commission "shall certify the facts to the Attorney General", who shall "cause appropriate proceedings to be brought for the enforcement of the" penalty. Expressly, however, there is no reference to Section 10.

The amendments of March 21, 1938, were designed basically and primarily to relieve the Commission of the routine necessity of going to the Circuit Court of Appeals (as was the case prior to 1938), in each and every instance, before it could become empowered to enforce its cease and desist orders.

Prior to the 1938 amendments, the courts had held time and again that a Commission cease and desist order could not be enforced by the Commission except by first obtaining an enforcement decree from a circuit court of appeals: *Federal Trade Commission* v. *Balme*, 23 F. (2d) 615; cert.

denied, 277 U. S. 598; *Federal Trade Commission* v. *Standard Education Society*, 86 F. (2d) 692.

Even where a respondent had appealed to the Court and lost, the Commission still could not enforce its cease and desist order unless it also had filed a cross-appeal or a separate petition for enforcement: *Federal Trade Commission* v. *Fairyfoot Products Co.*, 94 F. (2d) 844. The Seventh Circuit had even ruled that no enforcement decree would be entered at all unless there was proof of a violation of the Commission's cease and desist order: *Federal Trade Commission* v. *Morrissey*, 47 F. (2d) 101; *Federal Trade Commission* v. *Standard Education Society*, 14 F. (2d) 947.

Consequently, now that under the 1938 amendments a cease and desist order automatically becomes *final*, upon the expiration of the time for appeal, if no appeal is taken, no Circuit Court of Appeals would ever gain any jurisdiction, under such circumstances, to enforce such cease and desist orders. Necessarily and obviously, therefore, subsection (l) was added in 1938 primarily in order to provide an appropriate method of enforcing such "automatic" cease and desist orders under the new "automatic" provision.

We know of no evidence which even indicates that the Congress, in 1938, intended to upset the then 24 year old statutory scheme of court enforcement. Rather the Congress, in 1938, was legislating almost interstitially on that topic. Whether or not subsection (l) is ambiguous[28] is, we submit, a question quite apart from the problems to be decided and necessarily involved in this case. Subsection (l) is not involved in this case because (1) the Commission does not claim to be proceeding under its authority,

[28] Cf. Beer, *Federal Trade Law and Practice*, 480.

and (2) the Commission has never claimed that this respondent has in any way violated the law since the cease and desist order was modified and, as modified, affirmed, in 1943.

**4. Section 10—Particularly the Forfeiture Provision.**

Section 10 contains four unnumbered paragraphs which provide four different kinds of penalties applicable to four distinct types of violations of the Act.

a. The first unnumbered paragraph is directed only against "Any *person* who" improperly refuses to testify or produce documentary evidence. The penalty is a fine or imprisonment, or both. Corporations are not involved under this paragraph. It is not otherwise material here.

b. The second unnumbered paragraph, like the first, is directed only against "Any *person* who", and not against corporations. It provides for a fine or imprisonment, or both, if such person falsifies corporate reports, etc. It is not otherwise material here.

c. The third unnumbered paragraph provides for the forfeiture of $100.00 per day, *not* by "any *person* who", but *only* by "any *corporation* required by this Act to file any annual or special report * * *." The forfeiture applies, therefore, only if the failure is a corporate failure, but not if it is a personal or a partnership failure, to file an annual or special report required by the Act.

(i) Section 5 expressly envisages proceedings against *persons* or *partnerships* as well as against corporations, yet this $ 00.00 *per diem* forfeiture paragraph in Section 10 relates *only* to *corporations*. This is hardly consistent with any claim that Section 10 was intended and devised

by the Congress so as to be a general aid in enforcing Section 5.

(ii) The only section of the Act under which the Commission is given the express power to require a corporation to file annual or special reports is Section 6, subsection (b).

Any other failure or violation is immune to the forfeiture of Section 10, which is hardly consistent with the claim that it constitutes a general enforcement section. See the companion cases of *Federal Trade Commission* v. *National Biscuit Co.*, 18 F. Supp. 667; *United States* v. *National Biscuit Co.*, 25 F. Supp. 329.

(iii) No case has been found where any attempt was made to use Section 10 except in aid of Section 6, and the Commission has filed nothing under the Administrative Procedure Act to warrant a different conclusion.

(iv) Section 5, as has been mentioned above, is quite self-sufficient as to enforcement procedure.

(v) Therefore it would seem that unless the "additional and supplemental" report mentioned in the Commission's purported enforcement order of September 2, 1947, was genuinely and *bona fide* an "annual" or "special" report within the lawful intendment of Section 6(b),[29] the forfeiture provision of the third paragraph of Section 10 cannot be invoked in order to support the Commission in the present case.

The Commission has, moreover, made it quite clear through the Chief of its Division of Compliance, that it

[29] Note, that the $100.00 forfeiture does *not* apply to any failure to give answers in writing to specific questions, which are also provided for in Section 6(b); *U. S.* v. *National Biscuit Co.*, 25 F. Supp. 329, 331.

is *not* proceeding under Section 6;[30] it is simply continuing Docket No. 4320, which is, and always has been, exclusively under Section 5. Nor is the Commission attempting to commence a *new* prosecution under Section 5; it claims merely to be continuing an old case under Section 5.

Clearly, therefore, the forfeiture provided for in the third unnumbered paragraph of Section 10 is not applicable to this respondent.

d. The penalty provided in the *fourth* unnumbered paragraph is against officers and employees of the Federal Trade Commission. It is not at all material here.

**5. Résumé—Sections 5 and 6 Are Not Related, But Independent.**

The principal reasons which demonstrate that this assertion is true:—

(a) There is no cross-reference between them.

(b) Section 6 deals exclusively with corporations, so that it could not be invoked for enforcement of a Section 5 cease and desist order against an individual respondent, or against a partnership.

(c) The Rules of Practice, Statement of Policy, and Organization, Procedures and Functions of the Commission clearly indicate that the Commission has never regarded Section 6 as collateral to Section 5, nor can evidence be found of any prior judicial precedent, except one, where the Commission has even attempted to invoke Section 6 in aid of Section 5.

We refer to *Federal Trade Commission* v. *P. Lorillard & Co.*, 283 Fed. 999; aff'd *sub nomine*, *Federal Trade*

[30] Int. Salt, R. 36.

*Commission* v. *American Tobacco Co.*, 264 U. S. 298. That case was on its facts almost the reverse of this case.

In that case the Commission was attempting to use its Section 6 powers in aid of a proceeding just commenced, and possibly of a proceeding to be commenced (264 U. S. at p. 305) under Section 5. Both courts unanimously held against the Commission (although the point involved here was not decided, and seems not to have been advanced) but rather because the Commission's demands were so sweeping and so unreasonable that they violated the inhibitions of the Fourth Amendment against searches and seizures.

Indeed in the present case those same objections seem to be in point and to be quite valid; they are also relied on by this respondent, additionally.

(d) Section 6 lacks enforcement language except as to Department of Justice prosecutions resulting in *antitrust* decrees against *corporations*. The lack of specific enforcement powers or provisions in Section 6, with respect to Commission cease and desist orders under Section 5, is striking by its omission.

(e) The Congressional Committee reports (set forth above in this brief) clearly indicate that no relation exists between Sections 5 and 6.

(f) Section 5 is self-contained, and provides its own enforcement penalties, for "unfair competition."

(g) The $100 *per diem* forfeiture of the third paragraph of Section 10 refers only to *economic* investigations under Section 6(b).

(h) The Commission is erroneously and invalidly attempting to use the $100 *per diem* forfeiture as a lever,

*in terrorem*, of enforcement for Section 5, and in the endeavor to circumvent and to evade the lawful and retained exclusive jurisdiction of the Court of Appeals for the Seventh Circuit.

(i) Except as provided in that Court's final decree,[31] no independent jurisdictional fragment of this case has been left either to the Federal Trade Commission, or to any District Court.

## II

**The Commission's purported order of September 2, 1947, was invalid. It was predicated on Rule XXVI, paragraph (b), which, as applied to respondent in this case, is *ultra vires* and void.**

**Nevertheless respondent's further report constituted a compliance therewith.**

We believe that our first point has sufficiently disposed of the controversy, and we think that probably it is not necessary to add to the burdens of this Court by going further into the rule-making powers, if any, of the Commission.

This is because

1. As we shall show below in sub-topic B, the Commission has adopted one inconsistent theory after another about Rule XXVI in the progress of this controversy; and

[31] The petitioner's brief admits, with commendable candor, that the 1943 order of the Court of Appeals left it quite open to the Commission to proceed in the District Court for the single $5,000 penalty under Section 5(1). (Petitioner's Brief, pp. 4, 24.) However, as we have pointed out, that question does not arise in this case, because the Commission is not seeking that penalty.

2. In consequence, the Commission devotes a trifle less than two pages (50-51) of its present brief to so perfunctory a defense of Rule XXVI that the Commission may be said to have abandoned the point, all but technically.

But because we cannot be absolutely sure whether or not this Court might want to give some consideration to this topic we have endeavored to brief it comprehensively.

The purported order of the Federal Trade Commission, dated September 2, 1947,[32] is primarily predicated upon the authority of Rule XXVI, subdivision (b).[33] (The order also purports secondarily to be supported by Section 6(a) and (b) of the Federal Trade Commission Act, but we hope that we have shown in Point I, above, that this purported secondary support is erroneous, unlawful and insufficient.)

If, therefore, Rule XXVI (b) is *ultra vires* and void, as applied to this respondent under the facts and circumstances of this case, then the primary support of the Commission's order of September 2, 1947, fails, and the order and Rule will fall simultaneously.

### A. Background of Rule XXVI.

On August 11, 1947 (12 Fed. Reg. page 5450, Column 2) the Federal Trade Commission filed, and published on August 12, 1947 (12 Fed. Reg. pages 5444-5450), its Rules of Practice, including Rule XXVI, to be effective August 12, 1947.

The authority, declared and published, for making these rules, was stated (12 Fed. Reg. page 5444, top of Column 3) to be Section 6 of the Federal Trade Commission Act

[32] Int. Salt, R. 4-5.
[33] Int. Salt, R. 10; Petitioner's Brief, p. 65.

together with the Administrative Procedure Act (U. S. Code, Title 5, Ch. 19, Sec. 1001 *et seq.*).

The foregoing are the entire purported statutory supports for Rule XXVI. As printed in the Federal Register, and in the petitioner's brief, the first paragraph is lettered (a), the second paragraph is lettered (b), and the third paragraph is lettered (c). For convenience of reference, we adopt that lettering.

Subparagraph (a) of Rule XXVI simply provides for an *original* report of compliance. *No issue arises thereunder herein.*

Subparagraph (b) asserts the right of the Commission to require, from time to time, "*further*" reports of compliance. Subparagraph (c) is so subsidiary, dealing as it does with a matter of minor detail, that it may be passed by as immaterial. Petitioner's brief neither prints it nor notes its omission.

Rule XXVI is the only rule of the Federal Trade Commission which deals with compliance reports. Subparagraph (b) has apparently existed in slumber in various forms for some years,[34] but so far as our research shows:—

> 1. No court has ever yet declared this rule to be lawful, valid and enforceable; and
>
> 2. Not until the present time, almost thirty-four years after the enactment of the Federal Trade Commission Act, has any administrative attempt been made by the officials of the Federal Trade Commission to enforce subparagraph (b) in a Section 5 proceeding.

[34] The Commission's Brief below asserted (p. 17) that it dates back to October 2, 1937, in "substantially the same" form. Its present brief (p. 49) asserts that it goes back to 1936.

This consideration is of great importance because of the rule of statutory construction relative to non-user of alleged powers. In *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, this Court said at page 352:

> "* * * as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."

In the first place Rule XXVI(b) is anomalous in principle.

All litigation ends in a final judgment, just as in the present case the original proceeding of the Federal Trade Commission ended in a final decree of the Court of Appeals.

Likewise special proceedings end in the issuance of a writ of the court; for example, an injunction or a mandamus.

In no instance of private litigation known to the writer of this brief is a defendant or a respondent, after the end of a case or of a special proceeding, required to report in writing to his adversary whether he has paid the judgment, or whether he has obeyed the commands contained in the writ of injunction or of mandamus.

Other enforcement methods are provided by law for the enforcement of judgments and decrees. Similarly and in the present case two remedies exist, if it should ever be claimed, and if it should ever be proven in a court of law, that respondent has violated the 1943 decree of the Court of Appeals, viz.:

1. Contempt of court; or

> 2. The civil penalty of not more than $5,000 for each violation of a final cease and desist order, which is set forth in Section 5(l) of the Act.

Nearly a quarter of a century ago, Mr. Henderson (*The Federal Trade Commission*, at p. 77), had noted this anomaly.

Referring to the final cease and desist order he stated:

> "• • • with the issuance and service of the order, the case is complete. • • •"

Professor Beer agrees: *Federal Trade Commission Proceedings*, p. 429. Mr. Henderson then went on to observe that

> "• • • The Commission has, however, added an interesting postscript to the statutory procedure. • • • [to order a compliance report] • • • *there is no express statutory authority to issue such an order.* • • •." (Emphasis supplied.)

While there is no claim by the respondent herein, under the facts and circumstances of this particular case, that subparagraph (a) of Rule XXVI is invalid, we believe that we shall show that subparagraph (b) of this rule is *ultra vires* and void.

One further point arises which must also be mentioned here, before proceeding with the discussion of Rule XXVI(b).

The enactment of the Administrative Procedure Act (U. S. Code, Title 5, Sec. 1001, *et seq.*) on June 11, 1946, required the various Federal commissions and bureaus to prepare and publish a statement of their procedure, explicitly and definitely, because, under the provisions of that Act only published procedure, definitely and

explicitly stated, is lawful (§1002(a), last sentence; cf. §1005(b); §1008(a)).

Accordingly, and at some unknown date in 1947, the Federal Trade Commission created a new Division of Compliance, subordinate to the General Counsel of the Commission, and under the supervision of an Assistant General Counsel. The published statement, which first mentions this new Division of Compliance, is dated August 11, 1947, and was published the following day. (Organization, Procedures and Functions of the Federal Trade Commission; Section 12(c) thereof; 12 Fed. Register, p. 5452.)

At that same time the Commission published in its said statement of Organization and Procedures a new organizational section, Section 12, of which Section (c) forms a part. Section 12 also contained a subparagraph (a) of which only the first two sentences are material here. We quote them and they are as follow (emphasis supplied):

> "Sec. 12(a) Reports of compliance with orders to cease and desist are required in accordance with the provisions of Rule XXVI of the Rules of Practice. The Commission may by order require such *supplemental* reports of compliance as it considers warranted." (Note: no "*additional*" reports are mentioned. Clearly, therefore, they cannot lawfully be required).

We think it probable that when the organizational and procedural Section 12(a) was originally drafted, earlier in 1947, and adopted by the Commission, it did not even then intend to put on that Section the construction for which it now contends.

In previous pages of this brief we have directed the Court's attention to the fact that this respondent's original

report of compliance, dated July 12, 1943,[35] was not rejected by the Commission, but, instead, was received and retained by the Commission without objection. In the past the Commission has rejected, or has indicated that it claims the power to reject, an original report of compliance which it claims to be insufficient in whole or in some respect.

*Western Meat Co.* v. *Federal Trade Commission*, 33 F. (2d) 824, 825, 827. See also Commissioner Freer's article in 8 Geo. Washington L.R., 316, 336. Also appellants' brief below, page 59.

If, therefore, the Commission should reject an *original* compliance report as being insufficient or incomplete, what would be the orderly way to proceed thereafter?

The orderly method of procedure would be for the Commission to reject the report until it was complete. That is, the Commission would promptly ask for more to be added to the original report—for "supplemental reports". *And that is the exact and responsive phraseology of the second sentence of Section 12(a).*

We urge, in consequence, that when Section 12(a) was drafted and adopted the Commission intended to put upon it only the interpretation which we have just set forth, and not the sudden, novel and forced interpretation for which it now contends.

We believe that the accuracy of our interpretation is supported by the fact that for almost thirty-four years the Commission never claimed nor sought the novel power for which it now suddenly contends.

This new Division of Compliance has now apparently decided to attempt to create new law and novel forms of procedure, and to claim to have and to exercise powers

[35] Int. Salt, R. 32-35.

which for the last thirty-four years the Federal Trade Commission does not seem ever actively to have claimed to have or actively to have attempted to exercise.

### B. Rule XXVI(b) Is Not Authorized by Law.

The retreat of the Commission from one legal position to another reveals the weakness of its arguments in support of Rule XXVI(b). The Commission's complaint explicitly relies upon Rule XXVI and Sections 6(a) and 6(b) as the legal basis for the "additional" reports.[26] No assertion is contained in that pleading, which forms the foundation equally of the present case, the motion below and the subsequent appeal, as to the possible existence of a vague power, to be implied either from Section 5 or from a construction of the Act as a whole.

In fact, the Commission has further precluded the courts below and this court from taking such a view by declaring in its argument below that Rule XXVI, promulgated "in accordance with" the alleged rule-making power of Section 6(g), constituted an *implementation* of Section 6(b) (Plaintiff's brief in the District Court below in support of motion for summary judgment, page 3).

Petitioner cannot therefore properly ask this court to hold that Rule XXVI rests on some other vague "inherent power,"[27] because it has taken a contrary position in its complaint, as mentioned, and because no such argument was addressed to the District Court below.

No rule of law is better settled than that an appellant cannot, for the first time, on an appeal, take a position which it did not plead, and contrary to what it argued, before the original court below.

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[26] Int. Salt, R. 3, paragraph #4.
[27] Petitioner's Brief, p. 15.

*Petition of Herschmann* (C.C.A. 7), 163 F. (2d) 865, 867;

*Meyer* v. *W. R. Grace & Co.* (C.C.A. 7), 290 Fed. 785, 786;

*Witiak* v. *D. & H. R.R. Co.*, 153 F. (2d) 379, 381.

Notwithstanding this rule of law, the Commission shifted its legal position when it appealed from the District Court to the Court of Appeals. The Commission claimed twice in its "Statement of Points on Appeal" (Nos. 8 and 12)[38]; once in a point in its brief (Point III A; Appellant's Brief, pp. i, 9, 28) and at least eight times in the text of its brief (Pp. 11; 27—twice; 28—twice; 30; 32; 50) that it had "inherent" power to require such reports. Once it even advanced the rather desperate justification of "administrative necessity" (Appellant's brief, p. 28) and once the cognate excuse of "necessary authority" (*ib.*, p. 32).

Now, before this Court, except for the lurking and vestigial remnant of this line of argument just mentioned," it would seem to have been entirely abandoned.

The Commission would not have felt compelled to advance such vague claims if it were able to rest its argument upon the sure foundation of a statutory authorization.

By clear inference it appears that the Commission has been compelled to concede, as Mr. Henderson stated in the quotation from his book already mentioned, that "there is no express statutory authority to" support Rule XXVI, and particularly subparagraph (b).

Nor, we believe, does it advance the Commission's argument to claim authority for Rule XXVI (b) from the

[38] Int. Salt, R. 63, 64.

Commission's earliest usage with respect to *original* compliance reports.[39] This is because (1) this case does *not* involve an *original* compliance report; (2) respondents do not raise here, and did not raise below, any issue as to the lawfulness of *original* compliance reports; and, most importantly, (3) *there was no rule requiring any original compliance reports until years later!*[40] And the Commission both concedes that its "supplemental" report rule (XXVI-b) was not promulgated until 1936,[41] and does not deny that no serious attempt has ever been made to employ it until now.

In the light of the historical facts the claim of the Commission of a "long continued administrative construction"[42] would seem to diminish in substance to gossamer.

**C. The Commission Has Failed to Comply With the Requirements of the Administrative Procedure Act of 1946. Consequently Rule XXVI(b) and the procedure envisaged therein are invalid and void.**

Section 1002, subdivision (a) of the Administrative Procedure Act requires every "agency", as defined, which includes the Federal Trade Commission, to state and currently publish in the Federal Register its rules, procedures and statement of policy, and it further requires that all "*substantive* rules"—such as Rule XXVI—must be "adopted *as authorized by law.*" (Emphasis supplied.) Moreover, Section 1002(a) contains this very important concluding prohibition:

> "No person shall in any manner be required to resort to organization or procedure not so published."

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[39] Petitioner's Brief, p. 48, n. 11.
[40] Beer, Federal Trade Law and Practice, 426 and n. 37.
[41] Petitioner's Brief, p. 49.
[42] Petitioner's Brief, pp. 11, 38, 48.

Section 1005, subdivision (b), of the Administrative Procedure Act, provides further as follows:

> "(b) *No process, requirement of a report,* inspection, *or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law.* * * *" (Emphasis supplied.)

As we believe we have already shown, there is no express authorization by law to support Rule XXVI, subparagraph (b), and its requirements that "further" reports of compliance be filed.

Still further, Section 1008 provides

> "In the exercise of any power or authority—(a) No sanction[43] shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

Rule XXVI (b) is therefore *ultra vires* and void under the statutory provisions already cited of the Administrative Procedure Act.

In consequence the Commission had no lawful power to make, or to proceed under, its purported order of September 2, 1947.

Furthermore, unless the Commission had written with reasonable clarity (and had published), a procedural statement, from which it appeared that, in the enforcement of court decrees affirming (or, affirming as modified) its cease and desist orders (made, of course, *only* under the authority of Section 5 of the Federal Trade Com-

[43] By Section 4001(f)—" 'Sanction' includes the whole or part of any agency (1) * * * requirement * * * (3) imposition of any form of penalty or fine; (4) * * * taking * * * of property [*e.g.*, expensive and valuable books] * * * or (7) taking of other compulsory or restrictive action. * * *"

mission Act), the Commission proposed to proceed under the claimed authority of Section 6(b), or, of Section 6(a) and (b), of the Federal Trade Commission Act, such procedure would be invalid and void, quite apart from all other reasons, simply because the Commission had failed so to state in its Rules, its Organization, Procedures, and Functions, or its Statement of Policy, all required to be published pursuant to the Administrative Procedure Act.

But quite to the contrary, Section 10(b) of the published Organization, Procedures and Functions of the Commission indicates an intention to resort only to contempt proceedings and to Section 5(l) proceedings in connection with any attempts to enforce a Court's decree.

**D. Subparagraph (b) of Rule XXVI could be lawfully applied to this respondent only if the Court of Appeals' decree of April 20, 1943, were appropriately modified in some new court order.**

As will be pointed out below in Point IV, and as has been shown in our analysis of Section 5 of the Act in Point I, the Commission lost all its administrative jurisdiction over this case, known continuously in its records as Docket #4320, at the time when the Court of Appeals for the Seventh Circuit acquired its judicial jurisdiction over the case some six and one-half years ago.

And as we have already pointed out, the judicial review terminated in a "final" decree of that Court which brought this case, as a final decree or judgment brings every case, to a complete and utter end in all respects—except that that Court retained a reserved judicial jurisdiction for the limited and defined purposes mentioned in the final paragraph of its 1943 decree.

As the legal maxim runs, the expression of one is the exclusion of the others (*expressio unius est exclusio*

*alterius*) so that the expression of the reserved judicial jurisdiction by that Court was also the exclusion of any further administrative jurisdiction in the Commission.

Under such circumstances no statute gave the Commission the administrative jurisdiction which it attempted to arrogate to itself by making its purported order under subdivision (b) of Rule XXVI, and no court order had conferred any such jurisdiction upon the Commission.

If the Commission believed that a "supplemental" report was necessary, it could easily have applied to that Court, on notice to this respondent, and with a proper showing of facts and reasons, after which that Court would duly have heard this respondent. Thereafter that Court would have decided whether or not it had become necessary or apropriate "to enforce compliance in [any] respect with [its] decree and to prevent evasion thereof, and • • • to modify the decree • • •."

If yes, then, under its reserved jurisdiction, and under its general powers of equity, the Court of Appeals could, if it thought fit, have modified its decree by a new order so as to provide for some further kind of a report from this respondent.

The constitutional requirements of due process of law entitled this respondent to no less than the foregoing procedure, which would have granted to this respondent the necessary and constitutional minimum of notice and a hearing, which it has never had before the Commission at any time in this particular proceeding.

*Interstate Com. Comm.* v. *Louisville & Nashville R. R.*, 227 U. S. 88, 91;

*Wichita R. R.* v. *Pub. Util. Comm.*, 260 U. S. 48, 59;

*U. S.* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 288-289;

*Crowell* v. *Benson*, 285 U. S. 22, 47-48;

*Southern Ruy. Co.* v. *Virginia*, 290 U. S. 190.

**E. The *ex parte* attempt of the Federal Trade Commission to modify the 1943 decree of the Court of Appeals was unlawful and invalid.**

No presumption of law is better established than the presumption of legality.

Thus, every man is presumed innocent until proof beyond a reasonable doubt has established his guilt.

Likewise it is presumed that everyone obeys the law.

It was, therefore, to be presumed by the Federal Trade Commission that this respondent was continuing to obey the law, and that this respondent continued to obey the final decree of the Court of Appeals.

And again we repeat, the Commission has never claimed in the present case that respondent has disobeyed the law or the 1943 final decree. Moreover, the respondent has specifically filed with the Commission its "further report in writing"," in which it has set forth[44] its continued compliance. The Commission has retained, and has not returned, this report of compliance.

Mere suspicion that perhaps this respondent might not be obeying the decree, would, of course, not be sufficient to justify any action by the Commission. Such a suspicion, however, was not in the Commission's mind, we believe.

On the contrary, we think that this is merely the case of an endeavor by the Commission to require respondents

[44] Int. Salt, R. 18; Petitioner's Answer, par. X.
[45] Int. Salt, R. 25-26.

to relieve the Commission of the expense in which the Commission would be involved if it undertook to investigate directly[46] whether or not there was compliance with Courts' orders. (See Appellant's brief below, bottom of p. 28.)

The Commission's new Compliance Division appears to be attempting to establish a new and frugal precedent by which, without a scintilla of proof as to wrongdoing, the expense of compliance investigations can be transferred from the Commission to all respondents, to be borne by them as a kind of unlawful penalty, or novel forfeiture.

To have prepared the detailed report which the Commission called for, together with furnishing the books and papers which the Commission sought to acquire as a gift, would have involved this respondent in substantial expense amounting to hundreds of dollars.

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[46] As appears from the Commission's Brief (p. 30), what it is really seeking to do in this novel case is "to obtain [the] facts *from the parties*" *only*, and thereby to cast upon the parties all the expense and burden of the Commission's investigatory activities.

But "the customary role of [this] administrative agency" (Petitioner's Brief, p. 21) has heretofore invariably been to conduct its investigations in the field, through inquiries made of third parties. *Nothing contained in the 1943 decree prevents the Commission from making such field investigations.* (Incidentally, this is the only way in which private parties ascertain whether an enjoined defendant is obeying an injunction.)

Therefore the Commission is seeing ghosts, or creating straw men, when it claims (Petitioner's Brief, p. 13) that the decisions below put "a *general* limitation upon [its] powers", and prevent it from gathering facts, and disable it from securing information as to compliance.

Quite to the contrary, the Commission can generally gather facts and secure information from all third parties as fully as it pleases, under the 1943 decree, but at its own expense. But it cannot throw all this expense upon the respondent (the courts below held) without first obtaining a court order made after notice and hearing, as due process of law requires.

We respectfully suggest that the Commission is crying although its powers have not been hurt.

Respondent could not have been fined these sums of money without a lawful trial. Similarly, we urge that such sums of money cannot be taken from this respondent under a different kind of pretext by an *ex parte* order of an administrative body.

Article V of the Amendments of the Constitution of the United States contains the great American and Constitutional shield against the deprivation of life, liberty or property without due process of law.

Nothing is better settled than the rule which holds that notice and a hearing are the minimum requirements of due process of law before an administrative agency.

In the present case, however, the Commission at all times acted *ex parte*, that is, one-sidedly and secretly, just as did the old and discredited Court of the Star Chamber. This respondent had no notice or knowledge that the "additional report" proceeding of 1947 was contemplated; it had no knowledge or notice of what contentions the Commission's official who moved this matter forward before the Commission would make, or did make; and likewise there was no hearing before the Commission at which this respondent was permitted to set forth its own position, to meet such claims as the Commission's officials might have made, and to address to the Commissioners appropriate arguments upon the law and upon the facts for the consideration of the Commissioners and in opposition to the proposed proceeding. Such arguments, we must assume, might well have prevailed, had they been heard and considered by the Commissioners.

*Morgan* v. *U. S.*, 304 U. S. 1, 15, 18-20.

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[47] Int. Salt, R. 4.

Likewise all subsequent orders were made by the Commission *ex parte*[48] insofar as this respondent was concerned.

Within the framework of the organization of the Commission itself, we submit that this persistently one-sided and secret procedure was unlawful, irregular and improper.

The Administrative Procedure Act (U. S. Code, Title 5), in Section 1004, and especially therein in subdivision (a) and (b) provides for a proper hearing, and for giving notice to an administrative respondent concerning the matters of fact and law which will be asserted against him before the administrative body. These subsections also require an opportunity to be afforded to such a respondent for the submission to and consideration by the administrative agency of the respondent's facts and arguments.

As we have already pointed out prgviously, under the Administrative Procedure Act the Commission cannot lawfully follow any procedure which it has not published in an explicit form in the Federal Register. We have already mentioned the Commission's August, 1947, statement of "Organization, Procedures and Functions". With especial reference to Section 12(a) thereof—the "Compliance and Enforcement" section—it is not therein claimed that the "supplemental" compliance order mentioned in the second sentence of Section 12(a)—or any of the other orders made herein—may be administratively made *ex parte*, as was done in this case.

We think it true that the Administrative Procedure Act was intended to prevent the Star Chamber action which the Commission took in the present case.

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[48] Int. Salt, R. 12, 6-7.

And, we repeat, we believe that the Fifth Amendment likewise forbids such arbitrary proceedings *in camera*.

In concluding this topic, we ask the Court to bear in mind that, while our discussion of this point may at times have seemed to assume that the Commission had jurisdiction, yet it is our position that the Commission never had any such jurisdiction, and that such jurisdiction was exclusively and always in the Court of Appeals for the Seventh Circuit, as, we submit, the Courts below correctly held.

## III

**The Commission's rules, etc., did not purport nor lawfully permit it, in the disguise of requiring a purported report, to confiscate an expensive set of books without paying, or offering to pay, just compensation therefor.**

**The respondent otherwise essentially complied with the Commission's order.**

This point, particularly, the Commission sought to gloss over in its brief below, and quite ignores here.

The Commission's own rules nowhere purport to authorize it to compel the gift of a set of expensive books. This further and tacitly acknowledged obstacle the Commission attempted to gloss over below with the airy claim that it was all just a trifling matter of "form" (Appellant's brief below, p. 56)—the "form of the report".

But if, as a mere matter of "form", the Commission can lawfully require the gift to it of an expensive set of books, why cannot it claim the power, for example, to call upon General Motors Corporation to file a "special" report, and, "*as a part of the reports*" (Emphasis the Com-

mission's brief below, at p. 56), call upon General Motors for the gift of a set of expensive automobiles—say, one of each type and make?

The Commission's Rule XXVI (b), purports to justify it in requiring a respondent to file "further reports", but nothing therein contained purports to justify the Commission's demand that a set of expensive books be given as a gift to the Commission.

Notwithstanding this total lack of authority the Commission's purported order of September 2, 1947, called upon this respondent not only to file a considerable quantity of its papers and documents with the Commission, but also to give to the Commission, as a gift, a valuable and expensive set of books, the rate books, *in addition* to filing an "additional report" in writing.

Clearly this was an excessive and an unlawful demand.

For this reason alone, if there were no other in this case, we respectfully contend that the purported order of the Commission, dated September 2, 1947, was in excess of its lawful powers, and consequently, that it was void, and could form no lawful foundation upon which to predicate this action for the forfeiture of $100 *per diem*.

**A. This respondent complied with the purported order of the Commission, so far as validity of the order can be claimed under any theory of the case.**

The respondent's further report of compliance[49] states, by reference to the original report, that this respondent has, ever since the time of the original report of compliance, complied with the order of the Court of Appeals for the Seventh Circuit, and that respondent continues

[49] Int. Salt, R. 25-26.

to comply therewith in manner and form, all as set forth at full length in the original report of compliance.

The additional and supplemental report was received and retained by the Commission without objection.[50] We think it clear, therefore, that, in any view which may be taken of this case, this respondent has complied with the valid portion—if any—of the Commission's purported order of September 2, 1947, and that it has never been in default thereof.

In no event, therefore, is this respondent liable for the grievous and harsh forfeiture of $100 *per diem* which the act clearly intends to exact only from those who defiantly challenge the law or deliberately disregard it, and which clearly was not intended to apply to a respondent who respectfully defers to the asserted apparent authority and power of the Commission, and who seeks only to establish, through subsequent due judicial procedure, what is lawful, right and just in the premises.

## IV

### The power of the Commission to require an *original* certificate of compliance under sub-paragraph (a) of Rule XXVI is *not* now in issue.

Since the *original* compliance report was required by the Court of Appeals' 1943 decree, in the exercise of its equitable powers, the question of the power of the Federal Trade Commission in that respect is nowhere involved in this case. Respondent fully complied with that require-

[50] Int. Salt, R. 18, answer's par. X.

ment of the decree over six and one-half years ago,[51] as the petitioner concedes in its brief.[52]

Moreover, each of the lower Courts was careful to refrain from expressing any opinion on this topic.

We respectfully urge that the Commission, by laying some emphasis upon this topic,[53] is inviting this Court to pronounce a *dictum* upon a matter which is not an issue under the pleadings; which was not decided by either of the lower courts, and which is not a contested issue before this Court.

## CONCLUSION

**It is respectfully submitted that the opinions and judgments of the Courts below were correct, and that they should be affirmed by this Honorable Court.**

Respectfully submitted,

FREDERIC R. SANBORN,
*Counsel for Respondent,*
*International Salt Company.*

Dated: December 9, 1949.

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[51] Int. Salt, R. 32-35.

[52] Petitioner's Brief, p. 4.

[53] E.g.: Questions 1 and 2 on p. 2 of the petitioner's brief are too sweepingly phrased; so is specification of error 5 on p. 9, for, we submit, the Court of Appeals did *not* so hold. Likewise specifications 2, 3, 6 and 7.